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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

BRIEF FOR PETITIONER

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LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

BRIEF FOR PETITIONER

On certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review the judgment of that court entered herein on the 6th day of October, 1944, (R. 899) by a divided court, reversing the judgment of the District Court of the United States for the Western District of Virginia entered herein on the 25th day of January, 1944 (R. 577-9).

I. THE DECISIONS BELOW

The opinions delivered in the courts below are as follows:

(1) In the District Court of the United States for the Western District of Virginia, *Jewell Ridge Coal Corpora-*

tion v. Local No. 6167, United Mine Workers of America, etc. et al., 53 F. Supp. 935.

(2) In the United States Circuit Court of Appeals for the Fourth Circuit, *Local No. 6167, United Mine Workers of America, etc. et al., v. Jewell Ridge Coal Corporation*, 145 F. 2d. 10.

These opinions are set out for ready reference in the appendix to the petition to this Court for a writ of certiorari at pages 43 and 80, respectively.

II. THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court, based on section 240 (a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925, is invoked upon the following grounds:

(1) The case is of importance in the administration of the Fair Labor Standards Act of 1938, 52 Stat. 1060-9, 29 U. S. C. A. 201-219, inasmuch as the manner in which this statute is to be applied to a major national industry is directly in issue, and drastic effects both upon the economy of petitioner and of the industry in general and upon their future manner of operation are necessarily involved.

(2) The Circuit Court of Appeals has decided in this case an important question of federal law which has not been, but should be, settled by this Court.

(3) The Circuit Court of Appeals in this case has given improper effect to a decision of this Court, to-wit: *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* etc. (March 27, 1944), ———U. S.———, 64 S.

Ct. 698, 88 L. ed. (adv. ops.) 610, by taking that decision, which was based upon the facts, conditions and history of the iron ore mining industry, as declaring the law for the bituminous coal mining industry as well, notwithstanding the distinguishing facts found by the Administrator of the Wage and Hour Division of the United States Department of Labor and by the District Court, and by the Circuit Court of Appeals itself.

III. STATEMENT OF THE CASE

For brevity, the Fair Labor Standards Act of 1938 will be herein called the Act; the Administrator of the Wage and Hour Division of the United States Department of Labor will be called the Administrator; the International Union, United Mine Workers of America, will be called the Union; and the case of *Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123 etc., supra,* ———U. S.———, 64 S. Ct. 698, 88 L. ed. (adv. ops.) 610; 137 F. 2d. 176; 135 F. 2d. 320; 40 F. Supp. 4, will be called the Muscoda Case.

Italics are ours unless otherwise noted.

The opinions of the courts below in the case at bar, and the opinions of this Court and of the courts below in the Muscoda Case, are all set out in the appendix to the petition herein for a writ of certiorari, and for convenience we shall give the citations to that appendix as well as to the published volume.

(1) The Pleadings And Proceedings In This Case.

Petitioner filed its complaint (R. 3-17) on the 30th day of July, 1943, pursuant to the Federal Declaratory Judgment Act, section 274 (d) of the Judicial Code, 28 U. S. C. A. 400, as amended, against its underground workers as a class and the International Union, United Mine

Workers of America, their representative in collective bargaining, seeking judicial construction of the Act for the purpose of determining whether the word "workweek" as used in section 7 of the Act includes, by force of law, the time spent by the employees in traveling underground to and from their usual working places in petitioner's mines.

The respondents by joint answer filed September 8, 1943, (R. 18-27) asserted that petitioner's underground employees "are at work within the meaning and effect of the Act" from the time they "assemble" outside the portal of the mines at the beginning of the shift until they "disperse" there at the end of the shift, exclusive of the lunch period, and by counterclaim in behalf of themselves and all other employees similarly situated, respondents claimed, for the entire period subsequent to the effective date of the Act (October 24, 1938), the overtime compensation, one hundred per cent liquidated damages and attorney's fee provided by the Act. Before the trial began, respondents on November 6, 1943, filed an amendment to their counterclaim, disclaiming compensation and liquidated damages applicable to the period preceding April 1, 1943 (R. 28).

If the disclaimer is binding upon petitioner's employees, there is yet involved herein a sum estimated at $300,000.00, with a correspondingly large projection as to the industry as a whole. If the disclaimer is not binding and petitioner were held liable for back pay and overtime and statutory damages up to the limit of the Virginia 3-year statute of limitations, its resulting potential liability would amount to a great sum, estimated at approximately $1,000,000.00. If this sum with respect to petitioner, a comparatively small unit in a major national industry, is projected to the industry as a whole, the possibilities become ruinous on a great scale, as pointed out in the minority opinion of the

Circuit Court of Appeals herein, 145 F. 2d. 10, 15-16, app. pet. 92.

The case was heard by the District Court without a jury, which on January 25, 1944, entered judgment sustaining petitioner's contention that petitioner,

> "in computing the workweek of its underground employees on the basis of hours of work *in the mines at their usual working places* * * * *as provided in the effective wage agreements and continuations thereof*, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938" (R. 578).

Respondents appealed to the Circuit Court of Appeals for the Fourth Circuit. Before the appeal was heard respondents filed their petition in this Court for a writ of certiorari. The petition was denied by order entered by this Court on May 29, 1944. The Circuit Court of Appeals then heard the case and by a divided court entered judgment on the 6th day of October, 1944, reversing the District Court (R. 899). Petitioner was granted certiorari by this Court on January 2, 1945.

(2) The Parties.

Petitioner is engaged in the business of operating two mines, employing about nine hundred men in all, in the bituminous coal mining industry, in the Counties of Tazewell and Buchanan, in southwest Virginia. Respondent International Union, United Mine Workers of America, and its respondent affiliates are the representatives of petitioner's employees in collective bargaining.

(3) The Question Presented For Decision.

Specifically, the question here, as indicated by the above quoted passage from the District Court's judgment, is

whether the contract definition of a day's work ("seven hours work in the mines at the usual working places for all classes of labor, exclusive of the lunch period"), which is contained in identical language in the successive basic wage agreements negotiated and executed between the Union and the industry, effective in the entire period here involved, is in conflict with section 7 of the Act and therefore invalid. Respondents concede that petitioner in paying its employees has at all times complied with the wage provisions of these respective agreements.

More generally stated, the question is whether *the Act requires* that the time spent by petitioner's employees in traveling underground to and from their usual working places in the mines be included within the "workweek" of such employees as the term is used in section 7 of the Act, and so paid for as worktime.

(4) The Respective Positions Of The Parties.

Petitioner here contends that the above quoted definition of a day's work contained in the above mentioned basic wage agreements is not in conflict with the Act, and that petitioner in discharging its contract obligations to its employees has likewise discharged its obligations to them under section 7 of the Act. The Union contends that the definition is in conflict with the Act by not including the underground travel time of the employees, and that petitioner consequently has not discharged its obligations to its employees under section 7 of the Act.

The familiar designations of the respective positions of the parties here are "face to face" as against "portal to portal." The basis for measuring the workday of the employees in this industry by the length of time spent by them "at their usual working places," in accordance with the contract definition, is the "face to face" basis. The

"portal to portal" basis measures the workday from the time of entering the mine opening ("portal") on the way to work until the time of emerging therefrom after completing the shift.

Petitioner thus contends that the Act did not operate to invalidate the "face to face" basis, while respondents contend that the "portal to portal" basis was made mandatory by the Act, and that the "face to face" basis thus became illegal by force of the Act. *Petitioner's position considers both "face to face" and "portal to portal" as allowable under the Act, and leaves the issue between them to be resolved from time to time by the elastic processes of collective bargaining. Respondent's position makes "portal to portal" rigid, exclusive and perpetual by force of law.*

(5) The Basic Wage Agreements.

The Act became effective October 24, 1938, while the Appalachian basic wage agreement, effective April 1, 1937, to March 31, 1939 (Ex. 8, R. 50), was in effect. It provided under the head of "maximum hours and working time" that a day's work "means seven hours work in the mines at the usual working places for all classes of labor, exclusive of the lunch period * * *" (Ex. 8, p. 3, R. 50). The next successive basic wage agreement, the Appalachian Agreement dated May 12, 1939, and effective until March 31, 1941 (Ex. 9, R. 51), defined the working day in identical terms (Ex. 9, p. 3, R. 51), as did the next which was the Southern Agreement, effective April 1, 1941, until March 31, 1943 (Ex. 10, pp. 2-3, R. 51). The last mentioned agreement remained in effect, or at any rate the industry continued to operate under it when operating at all, until the Ickes-Lewis Agreement of November 3, 1943 (Ex. 41, R. 310, 793-5). The last mentioned agreement provided a modified "portal to portal" basis of

measuring the workday instead of the "face to face" basis provided in the previous agreements, and the respondents are not here contending that petitioner is liable subsequent to the date of the Ickes - Lewis Agreement.

(6) The Act

Section 7 of the Act, so far as pertinent, is as follows:

> "(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and-half times the regular rate at which he is employed."

(7) The "Face to Face" Basis Has Long Been Firmly Established in the Industry as a Whole, Both by Custom and by Advocacy of the Union and by an Unbroken History of Bona Fide Collective Bargaining.

(a) The Coal Miner Has Always Been Deemed to be at Work When in his Usual Working Place and Not at Work When Going Thereto or Therefrom.

Workers in petitioner's mines and in the bituminous coal mining industry have definitely assigned working

places, termed in the basic wage agreements of the industry "the usual working places." From time immemorial and throughout the industry the measure of the working time of the employees has been the time spent by them at such working places. While going to and from such working places they have, *by invariable usage and common acceptation*, been deemed not to be "employed" or at work—"it *never* included travel time as a matter of pay or as a matter of work . . . *I never knew of any exception* in the bituminous coal mining industry . . . (R. 128). I never heard it referred to as work until now . . ." (R. 129).

As found by the District Court:

> " . . . . The evidence shows beyond question that, in the bituminous coal industry in this country, for the past fifty years, travel time of underground workers has not been considered work time" 53 F. Supp. 950, app. pet. 73.
>
> " . . . By the universal custom and usage for the past fifty years, and by agreement of the parties every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time. And this is the condition which prevailed when the Fair Labor Standards Act was enacted in 1938, and of which it must be presumed Congress was aware . . ." 53 F. Supp. 950, app. pet. 74.

The "face to face" basis has been an unchanging part of the collective bargaining agreement of the industry:

> "The 'face to face' basis is traditional in the bituminous coal mining industry in this country, and has universally been the basis for the determination of hours of labor therein for approximately the past fifty years" 53 F. Supp. 939, app. pet. 50.

On this point the District Court quoted from the "Hoage Letter":

"This method of measuring the working time at the place of work has been the standard provision in the basic agreements for almost fifty years, and is the result of collective bargaining in its complete sense." 53 F. Supp. 940, app. pet. 51 (Ex. 19, R. 142, 669).

To the same effect was the finding of the Administrator:

"*Here is a large industry with about half a million employees in which the method of computing hours worked is virtually uniform throughout the industry and has been for many years.* Furthermore it is an industry in which this uniformity in agreement on hours worked has been achieved by national collective bargaining, and arrived at by the employers and the employees year after year in joint meetings which go back for half a century . . . *The determination of working hours has not been established in this way and with such uniformity in any other industry in the United States*" (R. 694).

(b) The Union has Always, Before Now, Been a Prime Exponent of, and Contender for, the "Face to Face" Basis.

The Union has long recorded itself consistently, definitely, strongly, in many different ways, under many different circumstances, directly and indirectly, in opposition to the interpretation for which it is here contending. It is extraordinary, indeed it would have seemed impossible, that the Union would now, in the gravity of a court proceeding, seek to reverse everything for which it has formerly stood, in favor of which it is so fully recorded. The sole reason for the Union's turnabout was to provide a means to a wage increase in 1943, after it had tried all other avenues of approach and found them closed by the national wage stabilization program (53 F. Supp. 941, app. pet. 54-5).

"Face to face" is not a usage which like Topsy "just growed", but, aside from caring for the actual working

time, it is tailored to the needs of the industry *under conditions of normal competitive operation.* It is supported by the essential and cogent considerations strongly expressed in the Houck Letter (Ex. 19, R. 142, 667-671, 53 F. Supp. 950-3, app. pet. 75-9), which the Union joined in composing and subscribing, and which will be hereinafter more particularly discussed. The Union's present position involves the contention that Congress intended to place a mandatory ban upon this carefully considered system and the wage structure it has so long supported.

(c) In Making the Basic Agreements, the Employees in the Industry have been Represented by a Powerful and Effective Union, and the Agreements so Produced Resulted from the Processes of Collective Bargaining in Which the Union Was a Free and Uncoerced Agent.

The record does not show just when the practice commenced of making the basic wage agreements *for the entire industry* by collective bargaining between the Union and the appropriate operators' bargaining association, but the continuous history evidently goes back at least to 1890 when the Union was organized (R. 325). The basic wage agreements thus negotiated have in more recent years run for a two-year term.

It is a matter of common knowledge that the biennial wage conferences, held usually in New York City and commencing some weeks prior to the expiration date of the then effective agreement, have long been occurrences of prominence and importance, not only to the industry itself but also to the country as a whole. They have customarily received large publicity in the public press and otherwise, and have been followed with rapt attention by the general public. They have not infrequently and indeed

generally been punctuated by deadlocks and by strikes which affected the entire economic life of the nation.

The Union, as the record shows, is the most powerful labor organization in the country (R. 176). With the unquestioning loyalty of its members and the consequent power of the "strike weapon" (R. 176), it can and does exercise, and long has exercised, a "force and compulsion" (R. 176) which the operators, and even the agencies of the government, have found no "comparable" means to combat (R. 320).

On this point the District Court found:

> "The record in this case by no means discloses 'a pitiable picture of helplessness against the domination of the mining companies'. On the contrary, the record here does disclose the picture of the 'strong and powerful' union mentioned by counsel (for respondents), which is able and willing, when it feels aggrieved, even in time of war, to paralyze the production of bituminous coal in this country by a strike. . . . It is hardly likely that such a union has been been coerced by the coal operators into waiving any valuable monetary right to which its members were entitled by law" 53 F. Supp. 948, app. pet. 70.

Hence the "face to face" basis was established not only by the custom of the industry, but also by the long succession of collective bargaining agreements *representing the uncoerced will of the Union* — "the result of collective bargaining in its complete sense" (Houck Letter, R. 669).

(d) The Documents Embodying the Results of the Collective Bargaining, Disclose a Total Absence of Contention on the Part of the Union that Underground Travel Time is Worktime, though the Circumstances which Produced these Documents were Such as Naturally to Have Evoked that Conten-

tion if the Union had Believed it to be True.

The period documented in the record commences in the year 1933, when petitioner's employees were organized (R. 42). But the prior documents containing the "face to face" provision go back, as already seen, "for almost fifty years".

(1) *The NRA Code of Fair Competion for the Bituminous Coal Industry.*—This document with its amendments (Ex. 1, 2 and 3, R. 42, 45, 46, 585-626) was drawn pursuant to the National Industrial Recovery Act, which was "the first general regulation of wage and hour standards for private employment". 53 F. Supp. 942, app. pet. 57. As found by the District Court, it was:

> "*drawn up for the industry by representatives of the Union and the Operators, and was approved by the President of the United States*", 53 F. Supp. 939, app. pet. 50.

The "face to face" basis of measuring working time was carried into the Code without opposition or question, either from the Union or anyone else (R. 132). John L. Lewis testified at the Code hearings (R. 131-2) and filed a lengthy brief (Ex. 18, R. 134, 632-666). This specifically recognized "face to face" ("the workday . . . refers to the time to be spent at the face of the coal vein, and does not include the entire period underground"—R. 656-7), and voiced no sort of objection thereto. Much of the brief was taken up by an argument for the six hour day, which was to be six hours of "actual work at the place of work" (R. 132).

Overtime work was absolutely prohibited by the Code—"No employee shall be employed in excess of seven hours per day and five days per week, *and this means seven hours work at the usual working places* for all classes of labor,

exclusive of the lunch period" (Ex. 3, Art. III, R. 611). This provision emphasized that travel *was not, and could not be, considered work or 'employment'* since the entire seven hours permitted was spent at the face.

There is a striking parallel between the use of the word "employ" in the Code and the Act, suggesting that the one was the prototype of the other and that the interpretation of the former should be applied to the latter for this industry.

A new basic wage agreement with the Union (Ex. 6, R. 48) was made as of April 1, 1934, carrying into effect the above-mentioned Code amendments, but without in any way changing the "face to face" basis of measuring the workday. This contract was to expire March 31, 1935, but was continued in effect by successive extension agreements until October, 1935, when a new two-year contract was made, dated October 1, 1935. NIRA was declared unconstitutional by this Court before the 1934 agreement expired so that it was the last made under the Code.

(ii) *The Agreement of October 1, 1935.*—This new contract (Ex. 7, R. 49), negotiated without the Code restraint, measured the workday, just as before, on the "face to face" basis. Thus, the parties, after the Code went out, continued, by collective bargaining agreement, to measure the workday on the "face to face" basis as before.

(iii) *The Appalachian Agreement of April 2, 1937.*—This new two-year agreement (Ex. 8, R. 50) also, like its predecessors, defined the workday by the same old formula: "seven hours work in the mines at the usual working places for all classes of labor". Like its predecessors, it governed all the other operations in the Appalachian area as well as those of petitioner.

(iv) *The Appalachian Agreement of May 12, 1939.*—

This two-year agreement, industry-wide (Ex. 9, R. 51), *was made when the Act was nearly a year old and had been in effect for more than six months. There was no contention in the negotiations which produced this agreement that the Act had made any change in, or required any departure from, the traditional basis* of measuring the workday at the "face" (R. 183). Both parties considered themselves as free as before the passage of the Act to contract in respect to the measure of the workday and workweek for the underground employees—an inescapable conclusion from the terms of this agreement. It provided, just as the preceding agreements had, for a seven-hour day meaning "seven hours' work in the mines at the usual working places".

(v) *The Houck Letter of July 9, 1940.*—No question was made by any one of the legality of the contract definition until the beginning of the year 1940, more than eighteen months after the passage of the Act. The issue was then raised, not *by the Union, but by the Administrator.* The testimony upon which the District Court's findings were based (53 F. Supp. 940-1, 945-6, app. pet. 50-4, 62-3) was wholly undenied, though we are sure that it will be conceded that Mr. Houck was present throughout the trial in the District Court.

At the beginning of the year 1940, Ashmede, an Examiner from the Pittsburgh Regional Office of the Division, appeared at the Revloc shaft of the Monroe Coal Mining Company in Cambria County, Pennsylvania, and began an investigation of that company's practice in relation to the Act. (R. 136, 183). In the course thereof, he raised the question whether underground travel time should be included in the workweek according to the rule written into the consent decree in the Cornucopia Gold Mining Company case (R. 136). After an extended in-

vestigation, Ashmede made to his superior, Calfee, about February 14, 1940, an exhaustive report in which he discussed the question at length and stated as his opinion that the "face to face" basis was proper to be applied in the coal mining industry (R. 136). But he indicated that if the Cornucopia rule was the proper one to apply, then the Monroe Company would owe its underground workers something in the neighborhood of $70,000.00 for the overtime accumulated from October 24, 1938, through February, 1940 (R. 137).

The Monroe Company was in the central Pennsylvania field, and the facts touching the investigation were brought to the attention of Charles O'Neill, president of the Central Pennsylvania Coal Producers Association, and a director of the Monroe Company. This was the first time he had ever heard of the question of travel time being raised under the Act (R. 135). O'Neill brought the matter to the attention of respondent John L. Lewis (then and now president of the Union), who appeared surprised that the question had arisen (R. 137). J. D. A. Morrow, president of Pittsburgh Coal Company, producing approximately a million tons of coal a month, was similarly surprised (R. 184), and certain operators, whom he communicated with, were so surprised and skeptical that they refused to take the matter seriously (R. 186).

O'Neill, and Cowan, Vice-President of the Monroe Company, discussed the matter with Gallagher, counsel to Dorsey, Regional Supervisor of the Philadelphia office of the Wage and Hour Division, and Gallagher wrote a report in which he confirmed Ashmede to the effect that the "face to face" method was proper (R. 137). Still the Wage and Hour Division did not close the Monroe case (R. 138). Accordingly O'Neill again conferred with Lewis, and was referred to Lee Pressman, C. I. O. general counsel. Pres-

suant to an engagement made by Pressman, O'Neill and Cowan called at the Washington office of the Wage and Hour Division and discussed the matter with two attorneys for the Division, who implied that the Monroe case would be closed (R. 138), but that was not done. In the latter part of June or first of July, 1940, Morrow, Cowan and O'Neill discussed the question in Lewis' office with Lewis, Bittner, vice-president of the Union, Houck, director of the Union's legal department, and Welly K. Hopkins, Esq., who had become the Union's general counsel. After full discussion, Lewis, who had to leave, made an appointment for the others with the Administrator in person (R. 139, 187).

O'Neill, Morrow, Cowan, Hopkins and Houck called upon the Administrator and discussed the matter with him at length. He indicated agreement with their views (R. 140, 188), and referred the group back to Gallagher, in the Philadelphia office (R. 140).

The other members of the Appalachian Joint Conference Negotiating Committee for the operators, viz: W. L. Robison, L. T. Putnam and L. C. Gunter, were notified, and they, together with Houck, O'Neill, Morrow and Cowan, conferred with Dorsey and Gallagher, at the Philadelphia office of the Division, about July 9, 1940. This conference considered the question thoroughly and at Gallagher's suggestion set about the preparation of a joint letter to the Administrator setting out the facts and practices in the industry which might serve as the basis of an administrative ruling (R. 141), as well as for decision of the Monroe case. *The result was the Houck Letter of July 9, 1940, which they composed, signed and sent to the Administrator* (Ex. 19, R. 142, 667-671). This letter was the act of the entire group (R. 142, 190), and accurately stated the facts and reflected the consensus, both of

the group who collaborated in its composition, and of the previous conferees on the subject including Mr. Lewis (R. 142, 190). The Union "took the same position on this matter throughout as the operators did" (R. 142, 190). It was "*the consensus*" *of these conferees that the contract definition of the working day "was consistent with the provisions of the Wage and Hour Act"* (R. 187).

The District Court found as follows with respect to the position taken by the Union while the Administrator had the present issue under consideration:

> "Both the Operators and the Union officials *were definitely opposed* to any construction of the Fair Labor Standards Act which would require payment for travel time" (53 F. Supp. 940, app. pet. 51).

The Houck Letter is *primary testimony on the precise question here in issue from the very men best qualified in the entire industry to testify as experts thereon. These are the men of all others who knew the answer to that question. These are the men of all others upon whose statement the courts are entitled to rely in deciding that question.* The letter will repay careful study.

Among the points quoted by the District Court from the letter are the following:

> "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense" (53 F. Supp. 951-2, app. pet. 51).
>
> ". . . travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, *nor as hours worked by the employees*, and this has been the case since the eight-hour day was established in the industry—April 1, 1898" (53 F. Supp. 952, app. pet. 52).
>
> "Such a ruling, moreover, would establish such

diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated" (53 F. Supp. 952, app. pet. 52).

"This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines" (53 F. Supp. 952-3, app. pet. 52).

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, *and the definition of working time*, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry) as complying both with the provisions of the Fair Labor Standards Act and of the Interpretative Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act'" (53 F. Supp. 953, app. pet. 53).

Summarizing this letter, the District Court said:

" . . . not only is there no suggestion that by the terms of the Fair Labor Standards Act, travel time must be included in working time; on the contrary, it is positively asserted that any change from the traditional 'face to face' basis would 'result in complete chaos, and would probably result in a complete stoppage of work at practically all the coal mines in the United States'; and 'moreover', that 'the very purpose of the Fair Labor Standards Act would be defeated' by such a change" (53 F. Supp. 950, app. pet. 74-5).

It would be difficult to imagine any means by which

the Union could have become more definitely and completely recorded in opposition to its present position before this Court. *The facts show that the position then taken represented the mature, deliberate and unqualified conviction of the Union upon the exact present issue.*

(vi) *The Administrator's Ruling on the Issue.*—The Administrator communicated his ruling by letter addressed to Mr. Houck under date of July 18, 1940 (Ex. 20, R. 145, 672-3). He said:

> "*As you know, the determination of whether time spent in performing particular activities should be considered as hours worked depends upon the facts of the particular case. Accordingly, each activity must be scrutinized in relation to all the facts of the case.*
>
> . . . In view of the circumstances which you describe in your letter and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable."

The ruling was evidently made pursuant to paragraph 12 (quoted from in the Houck Letter—53 F. Supp. 953, app. pet. 79) of the Administrator's familiar Interpretative Bulletin 13 (Ex. 24, R. 178, 701), which contains the following provision:

> "No precise formula will solve this type of situation. What is unreasonably disproportionate depends upon the facts in the particular case and *reasonable standards agreed upon between the employer and employee will be accepted for purposes of the act.*"

A public release of the ruling was made on July 27, 1940 (Ex. 21, R. 147, 673), was publicly affirmed by the Administrator in his address delivered before the Ameri-

can Mining Congress September 18, 1940 (Ex. 22, R. 177, 685); and subsequently in his article published in the Engineering and Mining Journal, April, 1941 (Ex. 23, R. 177, 694). The ruling was definite and complete. The Monroe Mining case was closed, and as found by the District Court: ". . . it was thus administratively determined that the provisions of the Fair Labor Standards Act did not require the inclusion of travel time in the workweek of the underground employees in the bituminous coal mining industry" (53 F. Supp. 941, app. pet. 54).

The operators in Western Pennsylvania with whom the question had been raised accepted this ruling as a conclusive and final disposition of the issue, as did the industry generally (R. 191). The ruling was the consensus of all parties in interest—the Union, the Operators, the Administrator. There was no one left to object. *The industry relied upon the ruling and permitted a vast aggregate of potential "portal to portal" overtime claims to accumulate in the succeeding years.*

The time-table establishes that the Administrator's investigation and consideration of the question, before issuing his ruling, was deliberate and thorough. It extended from January, 1940, until July 18, 1940, when the ruling was made. Further consideration produced reaffirmance in September, 1940, and in April, 1941. It is noteworthy that *the latter reaffirmance was published subsequent to the converse ruling made by him upon the corresponding question in the iron ore mines,* which latter ruling was adopted by the District Court in the Muscoda Case (40 F. Supp. 10, app. pet. 104).

The Administrator has never departed from his bituminous coal ruling. He had intervened in the Muscoda Case and had participated actively in the proceedings as a

party, advocating the adoption of his iron ore ruling of March 15, 1941. He was invited to intervene in the case at bar (complaint, section IV, R. 14) and as noted by the District Court had counsel present throughout all the proceedings (53 F. Supp. 945, app. pet. 61). The District Court's inference was that the Administrator "did not wish to retract or modify his ruling . . . " (53 F. Supp. 945, app. pet. 61).

(vii) *The Southern Agreement of April 1, 1941.*— The 1941 wage conference was prolonged and was featured by the serious strike of 1941 and the split of the operators into two bargaining groups, Northern and Southern. The Southern Wage Agreement was finally produced under date of July 5, 1941 (Ex. 10, R. 51), which provided a 25% wage increase (R. 294). The same contract definition of the day's work was retained as before, and the Union at no time suggested that any change in the contract definition was made requisite by the Act or was even desirable (R. 148), *and this notwithstanding the intervening "portal to portal" ruling of the Administrator in the iron ore mines issued March 15, 1941* (40 F. Supp. 10, app. pet. 104).

(viii) *The Six-Day Week Agreement of February 10, 1943.*—This agreement, made between the Union and the Operators at the request of the Solid Fuels Administrator for the purpose of increasing the war-time national fuel supply, modified the 1941 agreement by providing for a sixth day of work of seven hours, to be paid for at time and a half (R. 135, Ex. 35, R. 303, 734). This provision was an amendment to the 1941 agreement, and *the additional day's work thus provided was measured by the same contract definition as before, without reference to travel time.* The accumulation of the potential travel time

liability was greatly accelerated by operations under the six-day week agreement (infra p. 76).

The 1941 agreement was the last basic wage agreement made under pre-war operating conditions. Later in 1943, came the 1943 Wage Conference, the failure of the negotiations, the strikes, the taking over of the mines by the government and the Lewis-Ickes Agreement of November 3, 1943, all of which will be discussed hereinafter (infra, pp. 38-48).

(8) The Facts of the Underground Travel in Plaintiff's Mines Negative the Proposition that the Travel Time is Work Time.

With the petitioner's mines, as with all other "drift" mines, the underground travel problem evolved and developed as the mine workings progressed (Houck Letter, 53 F. Supp. 952, app. pet. 77). At first, while the underground distances were short, no provision was made for transporting the men. All travel was on foot except when a man occasionally caught a ride in mule-drawn cars (R. 38). After 1915 electric power was used for hauling. The men continued to catch rides, and as the distance increased, the practice developed of waiting to take the men in. Out of this evolved the scheduled mantrip system now employed at these mines. Petitioner prefers for those men to ride the mantrips who have a considerable distance of underground travel and most of them do so, though this is not compulsory (R. 69).

The District Court found as a fact that travel in the mantrips is for the joint benefit of employer and employee (53 F. Supp. 939, app. pet. 48). It is obvious that both employer and employee derive an incidental benefit, since it is to the interest of each that man and work be placed in a position of effective proximity.

The District Court described the method of underground

operations and travel in his findings of fact (53 F. Supp. 937-9, app. pet. 45-9).

Mine workings are extended over a considerable area. Within that the men have regular places where they work. The only requirement of the men as to where and when they shall report for work is that they be at their working places at the beginning of the shift (R. 96, 97, 100, 113, 218). The District Court so found as a fact — "All plaintiff's employees *are required to be at their places of work*, for the morning shift, at 8 o'clock, A. M." (53 F. Supp. 938, app. pet. 46).

Most of the underground workers are coal loaders (R. 95). They have nothing to do before arriving at their working places (R. 97). *They are piece workers, paid an agreed rate per ton for loading coal*, which rate includes incidental duties such as timbering, handling slate and other things, varying to some extent in different mines (R. 41, 63, 106). In the early days these men ordinarily worked as contractors, supplying their own tools and equipment (R. 160), and were paid an agreed amount for a job. More recently, tools, explosives, etc., furnished by the miners, were covered in the contract rate per ton paid them (R. 163). It was not in response to any demand of the Union that the War Labor Board in 1943 required the operators to furnish tools for the coal loaders (R. 161). The loaders leave their tools at their working place (R. 97, 101). When one needs repair or other attention, he sees to that (R. 235). This does not happen more than four or five times a month (R. 368).

The "company men" comprise the other class of underground workers. Their province is to lay track, set "timbers", build "stoppings", and such (R. 97). They are paid by the hour (R. 97). Each of these has his usual working place on the particular day, where he is re-

quired to report for work (R. 99-100, 101-2). Before arriving there they do no work (R. 102).

About half of plaintiff's employees travel to work from the vicinity of their homes in vehicles operated by the company for the purpose at its own expense (R. 242-4, Ex. 28, R. 244-707). The vehicles used are trucks boarded up, with benches in them, so that they will hold from ten to eighteen men, and in addition buses and possibly other vehicles are used (R. 244). The highway distance traveled by the men in this manner ranges up to a maximum of seventy-two miles for the round trip, over mountain roads and in all kinds of weather (Ex. 28, R. 707). It is, of course, optional with the men to use this means of travel (R. 244).

At the mines the company provides and operates mantrips for continuing the transportation of the men to their working places. These mantrips are made up of mine cars drawn by electric locomotives ("motors") and usually have some five or six cars in a trip, but ranging up to fifteen or twenty cars when a haulage locomotive is used (R. 229). Whatever tools or other things the men may wish to take into the mines are put in the tool car (R. 226, 383), which is ordinarily the car next to the motor, and men by mining law are not permitted to ride in this car (R. 382). The cars are about twelve feet long and seven feet wide inside (R. 229). The bottom or lowest part of the car is two feet, six inches wide (R. 230). Alongside of that area, and rising above it, is a sort of bench (the "mourner's bench") two feet, three and three-fourths inches wide, and above that rises the outside wall of the car to a height of eleven inches (R. 230). The men riding in these cars ordinarily sit on the bench or, where the top is low, in the bottom of the car. Crowding in the cars is not permitted as found by the District Court (53 F. Supp.

939, app. pet. 48). Riding in them at the legal rate of speed is, as found by the District Court, "neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operations" (53 F. Supp. 939, app. pet. 49), i. e. than *work* in the mines. The conditions exhibit a striking contrast to those described in the Muscoda Case, as found as a fact by the District Court—"*I have found no such painful and burdensome conditions as those described in the iron ore mines*" (58 F. Supp. 949, app. pet. 71).

The mantrips are scheduled (R. 225), those going the greatest distance leaving first, and following so as to maintain an interval of at least five hundred feet. Their movement is governed by dispatchers, through the aid of a telephone system (R. 225). Each trip for purposes of safety, is under the supervision of a foreman (53 F. Supp. 939, app. pet. 49). His function is

> "right much like a conductor on a train. He directs the motorman and brakeman who are pulling that trip and supervises the safety of all who ride the trip" (R. 226).

The supervision of employees traveling on the mantrips, required by the mining laws, relates only to the safety of the transportation, and the men are subject to no features of direction for any other purpose—" . . . supervision is limited to the enforcement of safety rules and regulations" (53 F. Supp. 939, app. pet. 49). This is perfectly obvious upon inspection of the pertinent regulations, all of *which are prescribed by the public authorities, and not by plaintiff* (R. 382). The motormen are experienced and well trained in the handling of motors and mantrips (R. 228). The speed of the mantrips is kept as nearly as practicable at a maximum of six miles per hour (R. 164, 228). Nothing obnoxious is encountered on the travel ways (R. 438, 499).

The haulage ways over which the mantrips move are

more carefully inspected than any other portions of the mines and are much less hazardous (R. 509, 520). An accident on a mantrip is a rarity (R. 175, 264). This testimony is fully borne out by petitioner's experience. From January 1, 1939, a period of nearly five years, there were only six compensable accidents at both mines arising out of mantrip operation—*an average of 12,115 mantrip movements per compensable accident* (Ex. 45, R. 527, 807-9). As found by the District Court: "The injuries shown by the evidence to have been received by employees in plaintiff's mines on mantrips are surprisingly few in number and extent" (53 F. Supp. 939, app. pet. 49). On the record here shown, it is very doubtful that riding in plaintiff's mantrips is as dangerous as riding in an automobile on the highway.

In the mantrips, the men, both coal loaders and "company men", ride to the station nearest their working places. The length of travel from portal to working places in petitioner's mines varies from 4250 feet to 25,460 feet (Ex. 16, R. 115, 632). While carefully supervised for safety (R. 39F), men riding a mantrip are not asked to perform the slightest service. If a man on a mantrip is asked to do even so much as to throw a switch, his status changes and he is treated as being at work and paid from the instant of that service (R. 103). While it is true that on occasion a foreman, while on the mantrip, gives a man instructions about the day's work when he finds it convenient to do so, this is purely casual, as he similarly would give such instructions at any other convenient place or time (R. 267, 475). The giving of such directions on the mantrip is "rare" (53 F. Supp. 939, app. pet. 49). "Practically all the orders . . . . are given in the working place" (R. 267). As found by the District Court: "*No work or labor is required*

of employees while riding on mantrips" (53 F. Supp. 939, app. pet. 49).

Not all of the men ride a mantrip in; a total of seventy-two inside workers enter the mine at places other than the main portal, and proceed to their working places, either by walking the entire distance or riding a mantrip from the point of entry to the checking-in point (R. 116-123), which is on the man's particular "section" and at which there is a check-board where the man hangs one of his brass checks (R. 231). The men who walk in, use their own carbide lamps during the travel (R. 222). At the checking-in point they are furnished electric safety lamps which have been brought in for them on the mantrip by their foreman. It is significant that it is the foreman who gets these lamps from the lamp-house, carries them himself in a box to the tool-car of the mantrip, in which they are hauled to the section. He does not ask employees to handle this box or help with taking lamps to their fellow-workers, because "they are not yet at work" (R. 224). And in like manner, on the return trip in the evening, the foreman brings out these lamps.

The mantrips deliver the men to stations on the several sections. Near these stations are maintained the check-boards, and nearby is the section tool-box where the "company men" ordinarily have left their tools (R. 100). The men walk from there to their working places, which are in the immediate vicinity, some quite close and the most distant not exceeding approximately a quarter of a mile (R. 235).

At the end of the shift, the men are at liberty to go out of the mines as they please. The coal loaders who have "cleaned up" before the shift is over, frequently walk out without waiting for the mantrip (R. 239). More of the men walk out than in (R. 218). Those who desire to ride

out assemble at the station on the section and return by a mantrip conducted and operated in the same manner as the incoming trip (R. 227). Arrived at the outside, the men return the lamps to the lamp-house and go their several ways. Occasionally a man rides into the mine and for reasons of his own decides not to work. In such case he returns to the outside and is of course paid nothing for that shift (R. 240).

O'Neill said: "I don't think traveling is work" (R. 164). "It isn't work time as I have always known work time in that substantial number of years that I have been there" (R. 166). Those statements express a fair summary of the testimony under this head of the case, and the District Court so found as a fact.

(9) The Legislative History of the Act Negatives any Congressional Intent to Legislate a Change in the Contract Definition.

This branch of the facts in the case was carefully summarized by the District Court in his opinion (53 F. Supp. 942-4, app. pet. 56-61). The court said:

> "The bituminous coal industry is *sui generis*. Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts."

The court's conclusion is:

> ". . . . it seems to me clear that it was neither the intent of Congress nor the desire of the Union, in the enactment of the Fair Labor Standards Act of 1938, to interfere in any way with the wage structure of the bituminous coal industry" (53 F. Supp. 944, app. pet. 60-1).

(a) Congress, at the Time of Passing the Act, was Thoroughly Familiar with Conditions in the Bituminous Coal Industry.

The District Court referred to the conditions in the industry, "which prevailed when the Fair Labor Standards Act was enacted in 1938, *and of which it must be presumed Congress was aware*" (53 F. Supp. 950, app. pet. 74). This presumption is fully justified by the history, for when Congress entered upon the consideration of the Act, it had the conditions and the plight of this industry very freshly in mind. The Bituminous Coal Act of 1937 (50 Stat. 72, 15 USCA, sec. 828, ff.), approved April 26, 1937, had succeeded the Bituminous Coal Conservation Act of 1935. The Black-Connery bills, which became the Act, were introduced May 24, 1937, less than a month after the Bituminous Coal Act of 1937 was approved.

The coal legislation was made necessary by the fact that the industry had been operating at a deficit for a number of years. As found by the National War Labor Board,

> "The industry as a whole continued to report deficits through the year 1939. The year 1940 showed for the industry as a whole net profits for the first time in fourteen years" (Ex. 35, R. 303, 725).

The Coal Act was enacted for the purpose of stabilizing the economy of the industry by authorizing minimum prices for coal to be charged consumers, consisting of the weighted average cost of production (R. 203). It set up machinery for arriving at the amount of such prices (R. 202).

Pursuant to the provisions of the Coal Act, the Bituminous Coal Commission proceeded to hold hearings for the purpose of fixing these prices (R. 202). These hearings extended from July, 1938, to January, 1940 (R. 202), and so were in full swing at the effective date of the Act. They were very elaborate, the transcript containing some 40,000 pages of testimony and some 3,300 exhibits (R. 202). Hundreds of parties appeared (R. 203). The Union had its own representatives and in addition had two

members of the Commission itself, Major Percy Tetlow (who was a witness for respondents in the case at bar) and A. D. Lewis (R. 203). Tetlow was chairman and after the Commission was abolished he remained as technical adviser of the Bituminous Coal Division until the prices became effective in October, 1940 (R. 203).

Clearly if any party believed that the Act outlawed the "face to face" definition and made mandatory a change to the "portal to portal" basis, it was very much to the interest of such party to advance that contention in these hearings. If sustained, the necessary result would have been to include the consequent increased wages in the allowable operating costs and correspondingly to elevate the minimum prices to be charged the consumers of coal. Thus the consumers would have had to pay the increases so provided. The district boards were most anxious to overlook no allowable item of cost. They proposed every one they could think of—"we racked our brains" (R. 209). Yet throughout the course of the hearings and the further proceedings, neither the Union nor anyone else ever contended, or even suggested, that the Act required travel time to be paid for and that the expense thus entailed ought to be included in the minimum prices of coal (R. 204).

(b) The Legislative Consideration of the Act.

As found by the District Court:

> "In 1937 Fair Labor Standards Bills were introduced in both houses of Congress, and extensive hearings were held on these bills. Mr. John L. Lewis, President of the United Mine Workers of America, testified at length and at no time indicated that travel time should be included as work time. On the contrary, he indicated that he did not *expect* the bill to affect the coal

industry" (53 F. Supp. 943, app. pet. 57).

The court would have been wholly within the record if he had found further that Mr. Lewis had clearly indicated that he did not *desire* the bill to affect the coal industry, as shown by the quotations which the court made from Mr. Lewis' testimony (53 F. Supp. 943, app. pet. 57-8). Mr. Lewis said:

> ". . . . frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that collective bargaining agreements in the mining industry were not sound, not proper, were confiscatory, *or not in harmony with the facts of the industry and order a modification thereof.* I think the power of the board should be limited to cases which run *below the level of the standards fixed by Congress*" (53 F. Supp. 943, app. pet. 57-8).

Asked why the proposed board, if it should have "a right to investigate collective bargaining agreements below the wage level", should not have also the right to investigate collective bargaining agreements above the wage level, Mr. Lewis said:

> "Merely because their right of investigation of agreements *that were substandard* would be for the purpose of ascertaining whether that was so and of modifying them to meet the congressional standards" (53 F. Supp. 943, app. pet. 58).

In addition to the remarks quoted by the District Court, Mr. Lewis said:

> "If Congress fixes minimum wage standards of say 40 cents the only purpose of any investigation would be to determine whether or not that standard was enforced in the various industries, and *if obvious-*

ly it was enforced in the mining industry they would not need to investigate the mining industry. There would be no purpose in investigating the standard which was much higher than the minimum fixed by Congress." (Joint hearings before the Committee on Education and Labor, U. S. Senate, and the Commitee on Labor, House of Representatives, June 2-22, 1937, p. 297).

Mr. Lewis agreed to the correctness of the following summary of his testimony made by the Chairman of the Joint Committee:

> THE CHAIRMAN. As I understand your position, boiled down, with reference to the minimum wage—I want to be sure—it is that you favor a minimum-wage law written in such a way that it will preserve to the utmost the right of bargaining between employers and employees, but which will at the same time raise the low, substandard condition of millions of people, those who have been living in that sphere and have not as yet been able to elevate themselves either by their own bargaining or by collectively bargaining?
>
> MR. LEWIS. "That is correct, Senator" (Id. ib. p. 307).

The Congressional debates make it seem very plain that the purpose of Congress was precisely as summarized by the Chairman of the Joint Committee, namely, "to preserve to the utmost the right of bargaining between employers and employees but at the same time raise the low substandard condition of those who have not as yet been able to elevate themselves." This same sentiment was expressed in various ways too often during the debates to admit of any other conclusion. The following phrases are from the quotations made by the District Court (53 F. Supp. 943-4, app. pet. 58-60):

> "It is not intended that this law shall invade the

right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage." (Report of Senate Committee, July 6, 1937).

"(The bill) is concerned with those millions in industry who are unprotected and unorganized" (Mr. Randolph).

"(The bill) eliminates sweatshops" (Mr. Allen).

"I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to." (Mr. Fitzgerald).

"It is merely aimed at wiping out sweatshop conditions and child-labor. Those are the two salient features and should be kept in mind." (Mr. Connery, Chairman of the House Committee—this statement was made shortly before the bill was passed).

"We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining" (Message of the President, January 3, 1938).

Showing the vitality of the Union's approbation of this doctrine, even after the reversal of official Union position in late 1943, Major Percy Tetlow, member of the Union's negotiating committee and signatory of the 1941 agreement, testifying as a witness in the present case, said, as quoted by the District Court:

"No, the miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always

taken the position that any legislation which will improve standards of working men and women,—to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee" (53 F. Supp. 944, app. pet. 61).

(c) The Wage and Hour Standards of the Appalachian Basic Wage Agreement, Produced by "Collective Bargaining in its Complete Sense", are not Substandard or Sweatshop Conditions.

As has been shown, it was the intention of Congress that the Act should not interfere with wage contracts which provided higher standards of wages and hours than those set by the Act. *Particularly and definitely there was no intention that the Act should interfere with the basic wage agreement of the bituminous coal industry.* No other reasonable inference can be drawn from the legislative history. It is proper for the Court to resort to the legislative debates and committee proceedings for light upon the congressional intent in particular cases (infra. pp. 77-79).

Mr. Lewis made it perfectly plain in his testimony before the Joint Committee that this industry was not to be considered "substandard" or "sweatshop." In this view he was obviously right, as can be readily established. The Act provides (sec. 6, 29 U. S. C. A. sec. 206) a minimum hourly wage of $.30 for the period here involved. The wages fixed by the basic wage agreements were far higher. It was said in the "Houck Letter":

> "Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The

basic inside day rate in the North is $.857 per hour, and in the South it is $.80 per hour" (53 F. Supp. 951, app. pet. 76).

Under the 1937 and 1939 agreements the minimum rate (paid cripples, boys and old men) was $.571 (Ex. 8, pp. 48-50; Ex. 9, pp. 50-52). Under the 1941 agreement the basic wage was increased 25% to $1.00, and the minimum rate (cripples, boys and old men) became $.735 (Ex. 10, pp. 66-9). As said by the National War Labor Board, June 18, 1943, (Ex. 38-A, R. 305, 759-760):

> "Since 1933 the mine workers' wages have been progressively increased until in March of this year, 1943, with the six day week and the great war time demand for bituminous coal, their weekly earnings are up to approximately $43.00 per week, which puts them up with the higher paid workers in the war industry".

It is stated in the release of the United States Department of Labor on Hours and Earnings dated December 23, 1944, that for October 1944, "The average work week in all manufacturing was 45.6 . . . Average weekly earnings amounted to $46.98 in all manufacturing. . ." "The average hours per week in bituminous coal mining was 44.1 . . . Bituminous coal miners earned an average of $52.33 a week. . . ."

With respect to hours of work, the higher standards of the basic wage agreements as compared with those of the Act are similarly striking. The Act provides, sec. 7, that time and one-half shall be paid for all hours exceeding a weekly aggregate of forty-four in the year beginning October 24, 1938, forty-two in the year beginning October 24, 1939, and forty in the year beginning October 24, 1940, and thereafter. The three successive basic wage agreements which were in effect in the period from October 24, 1938, to November 3, 1943 (date of Ickes-Lewis Agreement), each

provided that time and one-half be paid *for all hours worked in excess of seven hours per day and thirty-five hours per week.*

These comparisons obviously justify the statement of the Houck Letter that

> ". . . these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid" (53 F. Supp. 951; app. pet. 76-7).

It is a fair summary that the documentary history of the Act and the statements in the legislative proceedings show that the Congressional intention was not to force upon this industry any departure from its established definition of worktime, and still less to interfere in any wise with the free play of the bona fide collective bargaining process with reference thereto. That process was recognized throughout as one of the efficient aids to the general designs of this legislation. Congress unquestionably knew (1) that this industry was hard-pressed economically, (2) that the Union had been highly successful in collective bargaining, (3) that in consequence the industry had standards of wages and hours far higher than those set up by the Act.

(10) The Evolution of the Union's Present Advocacy of the "Portal to Portal" Interpretation of the Act Shows that the Union's Position is Inconsistent and is an Afterthought.

(a) During the Five-Year Period Following the Enactment, the Union Never Contended that the Act Invalidated the Contract Definition of a Day's Work, though a Number of Opportunities Arose which would Naturally have Evoked that Contention, if the Union

had Believed it to be True.

In the five-year period after the enactment, the Union, if it had then believed what it now contends, must necessarily have availed itself of one or all of the following opportunities to advance the contention:

(i) The Hearings under the Bituminous Coal Act of 1937 (*supra*, pp. 30-31);

(ii) The 1939 Wage Conference and Agreement (*supra*, pp. 14-15);

(iii) The Administrator's consideration of the question and the Houck Letter of July 9, 1940 (*supra*, pp. 15-20).

(iv) The 1941 Wage Conference and Agreement (*supra*, p. 23).

(v) The Six-Day Week Agreement of February 10, 1943 (*supra*, p. 22).

(b) Throughout the 1943 Wage Conference the Union Sought a Flat Wage Increase for all Classes of Labor, both Outside and Underground, Applied on the "Face to Face" Basis, and Refrained from Seeking the "Portal to Portal" Basis.

The 1943 wage conference convened in New York March 12, 1943 (R. 288) and remained in session without agreement until the dispute was certified to the National War Labor Board on April 22, 1943 (Ex. 33, R. 302, 711). By agreement of the parties on request of the President (Ex. 29, R. 298, 708), the 1941 Agreement was extended to May 1st (Ex. 30, R. 299, 709). At the expiration of the extension the miners went on strike (R. 301), despite an order of the Board issued April 24, 1943, directing them to continue at work under the previous terms

and conditions (Ex. 32, R. 300, 710). The government on May 1st seized the mines (R. 301, 713) and the strike terminated May 6th (R. 713), the Union having agreed to extend the agreement to May 31 (R. 303). The Union abstained from appearing at the hearings before the Board on the wage dispute, which began May 10th (Ex. 33, R. 302,712), and also abstained from appearing before the fact finding panel appointed by the Board (R. 712). The Board on May 14th directed the wage conference to re-assemble and re-commence negotiations (R. 716), whereupon negotiations between the parties were resumed in Washington and continued until June 20th (R. 288-9). Meanwhile, at the end of the new extension of the 1941 agreement on May 31st, a second strike began (R. 303). On June 3rd the President of the United States requested the miners to return to work on June 7th (Ex. 37, R. 304, 738), which they did after receiving orders from the Union to return to work until June 20th (R. 304). On that date there was a third strike (R. 305) which was terminated June 23rd on appeal by the President, the Union at that time directing the miners to return to work for a period to end October 31st (R. 305).

On June 20th the 1943 Wage Conference dispersed, having found itself unable to reach an agreement, and "the matter of negotiation ceased" (R. 289). From that point the National War Labor Board was "in complete charge of the case" (R. 289). The mines were operated under the provisions of the 1941 basic wage agreement, until the Ickes-Lewis Agreement of November 3, 1943, was made (Ex. 41, R. 310, 793-5) which was approved by the War Labor Board November 5, 1943 (Ex. 41-A, R. 310, 795-6). During the entire period from May 1 to November 1 (except for a short period in the latter part of October) the Secretary of the Interior operated the mines (R. 309).

Throughout the 1943 Wage Conference from March 12th to June 20th the Union never at any time contended for a change from the "face to face" basis of measuring work... time—"there was a total absence of any suggestion that the method of pay be changed to 'portal to portal'" (R. 292). The sole issue upon which the conference was wrecked was the Union's demand for a $2.00 a day wage increase:

> "The United Mine Workers left no doubt on that point. What they wanted, first, foremost and all the time was a $2.00 a day wage increase."
> As Mr. Lewis stated to me and to all of us on many occasions, that meant two dollars, not a dollar and ninety-nine cents. . . . Throughout our entire proceedings, beginning in March until June 20, that was the demand. . . . There was never any suggestion . . . that they wanted to abandon the "face to face" method and go to "portal to portal". That was never the thing in mind. (R. 291-2).
>
> ". . . (The Union) at no time, in interpreting that demand and presenting it, urged or considered a real portal to portal demand, which would be a system in which the work day would begin at the portal and end at the portal, and throughout the period and until after the rejection of the First Illinois Agreement, there was never any suggestion made by any representative of the United Mine Workers for a change in the system from face to face to portal to portal" (R. 314).

As found by the National War Labor Board:

> " . . . *The United Mine Workers have not proposed to change the 'face to face' basis of payment.* On the contrary they have proposed merely to increase the hourly rate *under the present contract system.* . . . It would not be in fact payment to the mine workers for portal to portal. It is merely a general wage increase supported by the argument that the mine workers think

> they ought to have a general wage increase because on the average they will spend a certain amount of time in travel" (Ex. 38-A, June 18, 1943, R. 305, 759).

The language of the Union's demand with respect to wages and hours submitted to the 1943 Wage Conference pays lip-service to "portal to portal"—"to establish 'portal to portal' for starting and quitting time for all underground workers" (Ex. 35, R. 303, 722), but the implication of the words "portal to portal" in this language was immediately nullified by the succeeding demand which, under the heading "wage rate increases", after calling for a $2.00 a day flat wage increase for all classifications of inside and outside day men and equivalent increase for piece-workers, provides:

> "The increased rates *include* compensation to meet the 'portal to portal' starting and quitting time" (R. 722).

This meant not only that the *outside* men as well were to get the wage increases, which obviously had nothing to do with "portal to portal", but also that the increases were on the existing "face to face" basis, without any reference to the actual travel time, if any, of the particular employee. The District Court found the facts on this point as follows:

> "Thus, the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground" (53 F. Supp. 942, app. pet. 54-5).

(c) By Reason of the "Little Steel Formula" the National War Labor Board Declined to Approve the Union's Demands for a Flat Wage Increase in Their Successive

Forms on the "Face to Face" Basis. When it Finally Became Clear on August 24, 1943, that the Board was Firm in its Position, the Union was Faced with the Final Alternative of Abandoning the Wage Increase or the "Face to Face" Basis. Then, as a Last Resort, it Abandoned the "Face to Face" Basis.

The Union's demands, presented to the 1943 Wage Conference, for a flat wage increase on the "face to face" basis, were certified to the National War Labor Board by the United States Department of Labor on April 22, 1943, as hereinbefore noted, (supra, p. 38). These demands were denied by the Board upon the same ground on which they had been denied by the Operators—namely, the "Little Steel Formula" (R. 294). This Formula was the single reason for the failure of the demands. Had the issue been one between the Union and the Operators only, the Union would necessarily have won at least a portion of the increase by its use of the "strike weapon" (R. 176) which, as found by the District Court, it used,

> "even in time of war, to paralyze the production of bituminous coal in this country" (53 F. Supp. 948-9, app. pet. 70).

But the "Little Steel Formula," previously promulgated by the Board and now applied by it to the Union's demands, provided that:

> "no increases would be granted to any employees who had already received as much as a fifteen per cent increase" since January, 1941 (R. 294).

The Union undertook to ignore the Board. Its position, as stated by Mr. Lewis, was that

> "inflation was already here; that the stabilization program could not and should not be maintained and that

they were then doing and would do all they could to see that the stabilization program was not made effective so far as they were concerned" (R. 296).

With this in view, the Union absented itself from the Board hearings upon the Union's demands, stating through Mr. Lewis

> "that he could see no advantage in going before a Board that had already committed itself to a doctrine that would make it necessary to find against him" (R. 294).

However, the Board proceeded to

> "investigate the equities of the mine workers' case by the use of whatever reliable evidence it could procure, at the same time making every effort to assure procedural due process of law to the absent parties" (Ex. 35, R. 303, 719).

The Board's decision disallowing the Union's demands for a flat wage increase on the "face to face" basis was announced on June 17, 1943 (Ex. 38, R. 304, 738-749). Among the Board's findings were the following:

> "The mine workers' demand of $2.00 a day was . . . based upon an assumption or estimate that the travel time amounted on the average to an hour and one-half a day . . . The United Mine Workers proposed to spread this amount over all the workers *including those who did not go underground*, and so arrived at the proposed general wage increase of $2.00 for all mine workers . . . It is obvious that these figures are out of all proportion to any amount that could possibly be due to the mine workers under the Fair Labor Standards Act, even if the courts should decide all questions in controversy in favor of the mine workers. The demand is plainly and unmistakably a demand for an 'indirect wage increase in violation of the wage

stabilization policies,' contrary to the Board's directive order of May 25, 1943 . . . (R. 743).

"The further wage increase of $2.00 a day demanded now by the Mine Workers is an additional increase of 28.6% on top of the average increase of 18.2% which these wage earners have already received since January 1, 1941, or a total increase of 46.9%. It is obviously impossible for the War Labor Board to approve any such increase for the mine workers under the national wage stabilization policy. To approve it would fly in the face of decision after decision of this Board . . . (R. 748).

"The War Labor Board cannot fail to note that, by the insistence of the United Mine Workers, the negotiations for the new Appalachian Agreements have been carried on under conditions which violate the national no-strike agreement and are in themselves a defiance of the national wage stabilization policy". . . . (R. 748).

". . . the United Mine Workers, under the leadership of Mr. Lewis, have repudiated the no-strike agreement and insisted upon coming to the bargaining table with their demands in one hand and in the other hand the threat of a strike in an industry which affects the war production more vitally, perhaps, than any other industry. They have sought to use that threat, including the actual interruption of essential war production, to secure for themselves a favored position at a time when all responsible labor organizations in America have loyally adhered to the no-strike pledge" (R. 749).

The anxiety of the Union to retain the contract definition is measured by the above-described extraordinary lengths to which it went in seeking to obtain the wage increase without abandoning the definition. *This conduct cannot*

be squared with any conviction on the Union's part that the contract definition was illegal.

After this decision of the Board, the Union made its final effort.

It negotiated an agreement with the Illinois Coal Operators Association, a separate group, which was not a party to the Appalachian Wage Conference. This agreement, known in the record as the 'First Illinois Supplemental Agreement,' provided for an extension of the 1941 Agreement with certain modifications, of which the only one here pertinent is that which provided that

> "*each mine worker* shall be paid in addition to the sums provided for in said Wage Agreement and this Supplemental Agreement, the amount of $1.25 for each day worked, retroactive to April 1, 1943, and hereafter to April 1, 1945" (Ex. 39, R. 306, 772).

The Board considered this agreement and disapproved it under date of August 24, 1943, saying:

> "The Illinois mine workers have already had, since January 1, 1941, an increase in their straight-time hourly rates up to the limit of the Little Steel formula. *Their hourly rates are too high to permit the suggestion that they need to be increased for the purpose of correcting substandard conditions of living.* Therefore, under the national wage stabilization policy the War Labor Board could not approve a further general wage increase for these Illinois mine workers" (Ex. 39b, R. 306, 776).

This decision finally convinced the Union that due to the National Wage Stabilization Program it would be unable to obtain the desired increase without abandoning the contract definition. Accordingly, it then proceeded to negotiate a fresh agreement with the Illinois Coal Operators Association under date of *September 23, 1943*, which is

known in this record as the 'Second Illinois Supplemental Agreement' (Ex. 40, R. 307, 779-785), summarized by the Board as follows:

> "The Illinois Agreement now submitted to the Board *presents for the first time a true portal-to-portal method of compensation* for the mine workers. The 1941-1943 contract provides for a 7 hour day and 35 hour week of productive time at the working face, *excluding* travel time. * * * * * The Illinois Agreement proposes to substitute for this method a compensation for an 8 1-2 hour day *inclusive* of travel time, with payment at straight time rates for the 8 1-2 hours and overtime payment at rate and one-half for all time beyond 40 hours a week." (Ex. 40-A, R. 307, 786).

The National War Labor Board in considering this agreement compared the daily wage at straight time for eight and one-half hours provided by this agreement, with the daily wage for seven and three-quarter hours at *straight time and overtime* provided by the 1941 Agreement (averaging the travel time at an assumed forty-five minutes). It found on the basis of this comparison and assumption that the daily wage under this agreement exceeded the daily wage under the 1941 Agreement by thirty-seven and one-half cents, and to that extent it was unable to approve the Illinois Agreement (R. 787).

Thereupon, the Union negotiated with the Secretary of the Interior (who in the meantime had taken over the mines again for the government after the strike following the restoration in October—R. 309.) the Ickes-Lewis Agreement of November 3, 1943 (Ex. 41, R. 310, 793-5). This agreement adopted the Second Illinois Supplemental Agreement, with the modification that the lunch period was reduced from thirty minutes to fifteen minutes while the

"portal to portal" hours remained the same (R. 794), thus adding the additional fifteen minutes of working time (at time and one-half) needed to obtain the approval of the Board. The Board thereupon approved the Ickes-Lewis Agreement under date of November 5, 1943 (Ex. 41-A, R. 310, 795-6).

Thus the Union at long last abandoned the long established contract definition of the working day, but it is plain that it did so only after seeking by every means in its power, including prolonged defiance of the United States Government, to preserve the definition.

It is important to note that the Ickes-Lewis Agreement *was arrived at by collective bargaining and not on an assumption that the Act makes "portal to portal" mandatory.*

Furthermore this agreement, while abandoning the "face to face" basis, *does not by any means comply with a mandatory "portal to portal" basis.* Such a compliance would require, in the case of the coal loaders and other piece-workers, a separate wage calculation for each employee. The method of wage calculation under the Ickes-Lewis Agreement is to treat each employee arbitrarily as having forty-five minutes of travel irrespective of his actual travel time (Ex. 'H', Sec. 4, R. 346, 835-6). This method obviously operates to give some piece-workers more than they are entitled to and others less, since it is by the amount of the individual piece-worker's product that his hourly rate for application to the overtime is determined. The assumption of forty-five minutes of travel does not even yield average accuracy, since in one of petitioner's mines the average daily travel time is 88 minutes, and in the other is 67.1 minutes (R. 238-9).

(11) The Operators Adopted the Ickes-Lewis

Agreement through Collective Bargaining and Not Pursuant to the Act.

The narrative of the facts should probably be brought down to date in order that the Court may have the entire picture. The testimony in the case was closed on November 24, 1943, at which time the mines were still in the hands of the Government. Subsequent events, while not in the record, appear from governmental releases and the facts are not in dispute.

The statute under which the Government held possession of the mines was Section 3 of the War Labor Disputes' Act, 57 Stat. 163, 50 U. S. C. A. 1503, which provided that,

> "Any such plant, mine or facility . . . so taken . . . shall be returned to the owners thereof, as soon as practicable, but in no event more than sixty days after the restoration of the productive efficiency thereof, prevailing prior to the taking of possession thereof . . ."

The October, 1943, strike of the miners ended when the Ickes-Lewis Agreement was made on November 3, 1943. The "productive efficiency" of the mines was restored within a matter of days, but the Secretary of the Interior did not then return the mines to the owners. He let it be known to the operators that he did not deem it proper to return the mines until a contract was negotiated between the Union and the operators. He expressed from the outset the view which he subsequently stated in his letter of January 8, 1944, to the Attorney General, as follows:

> "The slogan, 'no contract, no work' continues to represent the basic attitude of the miners with respect to the production of coal . . . I am satisfied . . . that the present level of production is dependent upon continued Government possession until an operating agreement can be reached and approved."

The Secretary requested the Attorney General's opinion whether in view of the expiration of the sixty day period since productive efficiency was restored, the Government was required to return the mines to their owners. The Attorney General, by opinion dated January 14, 1944, replied that it was his opinion that the provisions of the statute did not require the return of the mines "under the circumstances outlined."

It was clear under the circumstances that the operators could not regain control of their property until they had reached an agreement with the Union. It was further clear that no more favorable contract than the Ickes-Lewis Agreement could be expected under current conditions. Accordingly the operators of the northern group made an agreement with the Union *by collective bargaining*, dated December 17, 1943, by which they adopted the provisions of the Ickes-Lewis Agreement. This agreement was approved by the National War Labor Board under date of May 19, 1944 (NWLB Release B 1533). Whereupon, the mines of that group were returned by the Government to private control. The following month the southern operators made a corresponding agreement with the Union and their mines were then returned to them.

The present situation is that the bituminous coal mines of the Appalachian area are operating under a contract between the Union and the operators which adopts the Ickes-Lewis Agreement, for a term ending March 31, 1945. This agreement, as hereinabove noted (supra, p 47), while not on the "face to face" basis, is not on an individual "portal to portal" basis either.

(12) A Mandatory "Portal to Portal" Definition of the Working Day Would, Under Normal Conditions of Competition, Create Practical Diffi-

culties in Operation which Could Not be Overcome.

It is a matter of common knowledge that during the existing war emergency, competitive conditions do not exist in the bituminous coal industry. There is an instant market for all coal which can be mined, at prices which press strongly against the ceilings imposed by governmental authority.

On the other hand, under the conditions which existed when the Act was passed and which may naturally be expected to return at the end of the war, the industry is intensely competitive. As said by the District Court:

> "The bituminous coal industry is *sui generis* . . . Its problems have been before Congress for many years. It is a highly competitive industry. Not only is there competition between the individual coal operators: there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry. And in this industry, the wage structure is of peculiar importance because the cost of labor makes up approximately two-thirds of the cost of the production of coal" (53 F. Supp. 942, app. pet. 56).

There are two principal elements in the economy of the industry, namely, wage equality in relation to tons of product and area freight rates. The former is impossible without the "face to face" basis. The entire country-wide system of operating and of marketing is meshed and knit with that basis at many points. Its abandonment would under normal conditions deprive many units of their competitive position. The record makes this clear. O'Neill is

a very important and experienced figure in the industry. He went to work in the mines as a boy in 1898 (R. 124). He became an officer of the Union, and by 1916 was a member of its scale committee, representing the Union in the making of the wage agreements (R. 124). Subsequently, he became identified with management, and has become one of its leading national figures. His testimony in this case was not contradicted. Summarizing the essential function of the "face to face" basis in bringing about a state of equilibrium in the economy of the industry, he said:

> ". . . this whole scheme of marketing and distributing coal is predicated less upon location than any other largely, widely distributed commodity. In other words, there has been an attempt, so far as I understand it, to localize production and distribution of coal, and that does depend upon distance. As you get away into the outer reaches you have very small, relatively small freight rate differentials for a broad coverage of distances between mines. The same theory that blankets the destination for the consumption of coal and the same theory that blankets large groups of mines for the minimum freight rate to these consuming destinations is the same theory that has caused the mining industry *to predicate its wage structure on equal hours of work at your daily task*" (R. 166).

Morrow expressed the same thesis as O'Neill:

> "If the basis of compensation was fixed as the time the man worked at his working place, you equalize the competitive conditions to that extent between mines, and to that extent you stabilize the earning opportunities of the men in the mines". (R. 196).

The stabilization of competitive conditions through blanketing of freight differentials and equalization of earnings opportunities and of area wage rates has been the result of a course of development extending over a period of

many years and worked out, as to the essential features of equalized earnings opportunities and wage rates, through a long course of collective bargaining agreements with the Union. Lewis has himself recognized the essential influence of these factors in the stabilization resultant. He said:

> "The United Mine Workers of America, *in supplying a uniform, competitive labor cost for bituminous coal mining*, has been the only stabilizing force which the industry ever had" (testimony before NRA, August 9, 1933).

O'Neill anticipates that the Union will join with the operators in seeking a return to "face to face" upon the return of competitive conditions:

> "This condition that we are getting into here now is going to change the relationship between mines, between districts, and the whole competitive situation that we have had in this industry for fifty years is being revolutionized by this thing called portal to portal pay, and it is being done, in my opinion, without consideration of its consequences at all, or perhaps, may I say, with a recklessness that shouldn't be in an industry like this at a time like this. I think that every statement contained in the letter (i. e. the Houck Letter) will be proven to be correct . . . *I think the industry and the United Mine Workers will, as competitive conditions return, have to back away* from this portal to portal thing in order to insure the *maintenance of competition* between operators and to insure *maintenance of work* for their own people" (R. 144-5).

It should be noted that changes in the length of travel are constantly taking place not only as between mine and mine, but also as between miner and miner, day and day (R. 62-3). Consequently the "portal to portal" basis will under normal conditions introduce a new and powerful

variable, destroying the equilibrium which had been reached in the industry's economy.

Tetlow, the Union's leading witness, strikingly confirmed the necessity of wage "uniformity":

> ". . . the United Mine Workers have always felt that any relationship with their employer, and because of the competitive conditions existing, it was necessary to have a wage structure of general application in all the producing districts because of the competitive nature of the industry. They were striving for uniformity because they knew that *the competitive relationships were such* that unless these standards were applied uniformly, it would prevent and destroy the carrying out of any agreement" (R. 350-1).

O'Neill stated it thus:

> " . . . *the longer the travel time is*, as stated in this letter, *the less productive time* is going to be gotten for the same pay at the face. This will radically change the conditions of cost of production between long travel time mines and short travel time mines, and under the stress of competitive conditions, is bound to result in complete chaos as to the ability of these neighboring mines to compete with each other. This wage scale has been predicated throughout the years upon the basis of trying to preserve—*(1) a reasonably competitive condition as between mines within districts, and (2), to give the same amount of work opportunity for earning to the mine workers themselves*, so in the exercise of the day's work they would get the same yield of production as the miner in the next mine from them" (R. 144).

The inequalities of working time and earnings opportunity which "portal to portal" will cause between the piece-workers themselves under normal conditions are implicit in the quotation last above. This will obviously be a matter of much greater importance when the short day returns, on account

of the much larger proportion of the "portal to portal" day which will then be consumed by travel in the case of the coal loaders who have long-travel working places.

IV. SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

Specification 1.—The Circuit Court of Appeals Erred in Not According Due Weight to the District Court's Finding of Fact that Underground Travel Time is Not a part of the Workweek Within the Requirements of the Act.

Specification 2.—The Circuit Court of Appeals Erred in Deciding that it was Foreclosed by the Muscoda Case from Considering the Distinguishing Features of the Findings of the Respective District Courts in the Two Cases as to:

(a) Underground Travel in the Respective Mines;

(i) Supervision by the Employer.
(ii) Physical and mental exertion.
(iii) Activity necessary to be performed for the employer's benefit.
(iv) Conditions peculiar to the occupation of mining.

(I) "Conditions Replete with Hazards."
(II) "Conditions Requiring Physical Exertion and Mental Alertness."
(III) "Conditions Unpleasant and Burdensome to Those Encountering Them."

(b) Custom;

(c) Collective Bargaining Agreements;

(d) Other Relevant Facts and Circumstances.

Specification 3.—The Circuit Court of Appeals Erred in Deciding that it was Foreclosed by the Muscoda Case from Considering the Fact that the Ultimate Change of Front by the Union was Made in Such Circumstances as to Entitle its New Position to no Evidentiary Weight.

Specification 4.—The Circuit Court of Appeals Erred in Failing to Give the Bituminous Coal Ruling of the Administrator the Proper Weight or Any Weight.

Specification 5.—The Circuit Court of Appeals Erred in Ignoring the Practical Difficulties in Operation which would Result from Construing the Act so as to Make Mandatory the Portal to Portal Definition of the Working Day.

Specification 6.—The Circuit Court of Appeals Erred in Ignoring the Equities of the Case in Favor of Petitioner.

Specification 7.—The Circuit Court of Appeals Erred in Failing to Give the Legislative History of the Act any Weight in Construing it.

Specification 8.—The Circuit Court of Appeals Erred in Deciding that the Humanitarian Purpose of the Act is Decisively in Favor of the Interpretation now Contended for by Respondents.

V. THE ARGUMENT.

Preliminary Statement

The practical alternatives before this Court in the instant case are as follows:

(1) A decision reinstating the judgment of the District Court would do two things, both greatly to the long-range interest of the industry, both employees and employers:

(a) it would restore the definition of the working day, as between "face to face" and "portal to portal" and the

various possible modifications of each, *to the area of collective bargaining*, where it resided prior to the decision of the Circuit Court of Appeals in the instant case, while not requiring any change from the existing contract;

(b) it would relieve the industry of the overwhelming accrued potential liability for travel time which has accumulated in reliance upon custom, collective bargaining and the Administrator's ruling;

(2) A decision affirming the judgment of the Circuit Court of Appeals would codify and perpetuate the "portal to portal" definition, making it impossible for the industry to modify or change it no matter how greatly both employees and employers might wish to do so with the advent of changing circumstances.

Specification 1. — The Circuit Court of Appeals Erred in Not According Due Weight to the District Court's Finding of Fact that Underground Travel Time is Not a Part of the Workweek Within the Requirements of the Act.

The weight to which the District Court's findings are entitled in the appellate court under Rule 52 of the Federal Rules of Civil Procedure, was discussed in our brief in support of the petition for certiorari (pet. pp. 19-23), to which we here refer the Court. The principle is that the District Court's findings "shall not be set aside unless clearly erroneous" (Rule 52).

In the instant case the Circuit Court of Appeals erroneously held that the District Court's finding "as to whether upon the basic facts travel time was part of the workweek within the meaning of the statute" *was not a finding of fact*, but was a "*mere conclusion involving mixed questions of law and fact*,"—"*merely*" *an* "*interpretation*" of the "underlying facts" which the District Court "had placed upon those

facts" (145 F. 2d. 12, app. pet. 84). Having reached this erroneous conclusion as to the nature of the District Court's finding, the Circuit Court of Appeals, pursuant to that conclusion, failed to give the finding its due weight as a finding of fact under Rule 52.

The authorities are clear that in cases of this nature the Trial Court's finding is *a finding of fact*. We cited in our brief in support of the petition the points in the opinions of the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case dealing with this question (app. pet. 20-1), which carry the authority of this Court's affirmance. This Court has since specifically ruled upon the point in *Skidmore* v. *Swift & Co.* (Dec. 4, 1944),——U. S.——, 89 L. Ed. (adv. ops.) 125, 127, 64 S. Ct.——, as follows:

> "*We have not, and can not, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.* Walling v. Jacksonville Paper Co., 317 U. S. 564, 572".

From this it is clear that the Circuit Court of Appeals erred in failing to consider the instant case independently upon its own facts in the light of the District Court's findings.

The holding of this Court in the *Skidmore Case* also sanctions the action of the District Court in the instant case in considering all of the facts in the case, including

> "scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct . . . and all the surrounding circumstances" (adv. ops. 127).

The holding also precisely sustains the position taken by the Administrator in his ruling in the instant case, in which he said:

". . . the determination of whether time spent in performing particular activities should be considered as hours worked depends upon the facts of the particular case. Accordingly each activity must be scrutinized in relation to all the facts of the case."

The Circuit Court of Appeals in the instant case erroneously declined to consider such facts and circumstances of the instant case (pet. 8-10).

There is this further point. It was said by Mr. Justice Jackson, in his concurring opinion in the Muscoda Case:

> *"A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. Goodyear Tire & Rubber Co., Inc. v. General Dry Batteries, Inc.*, No. 262, October Term, 1943, decided February 28, 1944; *District of Columbia v. Pace*, No. 117, October Term, 1943, decided January 10, 1944; *Baker v. Schofield*, 243 U. S. 114, 118; *Williams Manufacturing Co. v. United Shoe Machinery Corp.*, 316 U. S. 364, 367." (App. pet. 144).

This Court has such "concurrent findings" before it in the instant case in practical effect. The Circuit Court of Appeals plainly indicated (v. pet. 8-9), in spite of its reversal of the District Court, that *except only* for the decision of this Court in the Muscoda Case *it would have affirmed the District Court*, saying that the District Court's finding and decision "would be convincing were it not for the (Muscoda) decision . . ." (145 F. 2d. 11, app. pet. 81). To the same effect the Circuit Court of Appeals said:

> *"In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the "face to face" basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act*

and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the workweek, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry." 145 F. 2d. 11, (app. pet. 81).

Hence petitioner is essentially entitled to the position in this Court of a litigant who has in his favor concurrent findings of both Courts below upon the single question of fact in issue.

The Circuit Court of Appeals misconstrued the general language of this Court in the Muscoda Case and misconceived the effect of that language, inferring therefrom that this Court, while it "made reference to the findings below" in the Muscoda Case, was of opinion that "*irrespective of the findings* . . . travel of the sort here involved should be considered work within the meaning of the statute . . ." (145 F. 2d. 11, app. pet. 82). Proceeding from this premise, the court arrived at the erroneous conclusion that it was inhibited by the Muscoda Case from scrutinizing the findings of specific facts in the two respective cases for their distinguishing features.

This was manifest error. In view of Rule 52, this Court did not arrive at its decision in the Muscoda Case "irrespective of the findings", and would not so arrive at its decision in the case at bar. It is true that this Court held that under the facts and circumstances, and in the light of the District Court's findings of fact, in the Muscoda Case, the underground travel in that case was work within the meaning of the statute. But this Court did not decide in the Muscoda Case that underground travel in the mines there involved was "the same sort of thing" (145 F. 2d. 12, app. pet. 84)

as travel in petitioner's mines in a different industry and under widely different conditions, facts and circumstances. Nor did it decide that the underground travel in the Muscoda Case was sufficiently "the same sort of thing" to justify the Circuit Court of Appeals in making the general language of this Court in the Muscoda decision decisive of the case at bar. The term "the same sort of thing" is obviously relative and indefinite, and is wholly insufficient to bridge the wide gap between the facts in the two cases.

The Circuit Court of Appeals, in making the general language of the Muscoda decision decisive of the instant case "irrespective of the findings", violated an important and familiar principle of procedure to which we referred in our brief on the petition (pet. 18-19), namely, that *the decisive effect of judicial language is to be confined to the evoking factual setting*. This principle was recently reaffirmed by this Court in *Armour & Co.* v. *Wantock* (Dec. 4, 1944), ——U. S.——, 89 L. ed. (adv. ops.) 120, 125, 64 S. Ct. ——, in which it was said in an opinion by Mr. Justice Jackson:

> "It is timely again to remind counsel that *words of our opinions are to be read in the light of the facts of the case under discussion.* To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

Pursuant to that principle, the Circuit Court of Appeals should not have taken the general language of this Court in the Muscoda decision as precluding consideration of the merits of a distinct state of facts. That the facts of the case at bar are indeed distinct from those of the Muscoda Case

is readily demonstrable, as will be shown in the next succeeding specification.

Specification 2. — The Circuit Court of Appeals Erred in Deciding that it was Foreclosed by the Muscoda Case from Considering the Distinguishing Features of the Findings of the Respective District Courts in the Two Cases as to:

(a) Underground Travel in the Respective Mines;
(b) Custom;
(c) Collective Bargaining Agreements;
(d) Other Relevant Facts and Circumstances.

If the Circuit Court of Appeals had felt at liberty to consider the specific findings, it would necessarily have concluded that the instant case presents a state of facts which is far from identical with that of the Muscoda Case, as is demonstrated by the following analysis.

(a) Underground Travel in the Respective Mines.—

In the Muscoda Case the District Court found certain conditions of underground travel in the iron ore mines which bore "every indicia of worktime" (40 F. Supp. 10, app. pet. 102), namely:

(i) Supervision by the employer.
(ii) Physical and mental exertion.
(iii) Activity necessary to be performed for the employer's benefit.
(iv) Conditions peculiar to the occupation of mining.

These items compare as follows with the facts in the instant case.

(i) *Supervision.*—With regard to reporting for work: in the Muscoda Case the men report for work at the "tally-house" near the mine entrance (88 L. Ed. (adv. ops.) 613, app. pet. 134), while in the instant case they report for work "at their places of work" (53 F. Supp. 938, app. pet. 46).

With regard to general supervision of the underground travel: the District Court in the Muscoda Case found that the transportation "was had under the strict control and supervision" of the employers, "exercised in the interest of efficient operation of their mining business" (40 F. Supp. 10, app. pet. 101-2), while in the instant case supervision is limited to the employment of safety rules and regulations (53 F. Supp. 939, app. pet. 49), prescribed by the public authorities (R. 381-2), the authority of the foreman in charge of the trip being equivalent to that of the conductor of a train (R. 226, *supra*, p. 26).

The District Court in the Muscoda Case further found the following details of supervision: the employer

> "prescribed the schedule of the trips, the speed of the trips, the loading of the men into the trips, the rules of conduct during the trips, and in most cases required the men to ride the trip rather than walk" (40 F. Supp. 10, app. pet. 101-2).

In the instant case, the only item in common with the above is, that petitioner prescribes the schedule of the trips, for the obvious purpose of assuring that the employees with the longest travel would start first so as to save the time of those with shorter distance to go (53 F. Supp. 939, app. pet. 48-9). With regard to the speed of the trips, that feature in the instant case is determined by mining law and not by petitioner (R. 164). With regard to the loading of the men into the trips, the supervision in petitioner's mines was limited to a prohibition against crowding, whereas in the

Muscoda Case overcrowding appears to have been required by the employer—"crowded to the extreme" (40 F. Supp. 9, app. pet. 101); "ten men sit on each mantrip car, while from 30 to 40 are crowded into an ore skip . . . they thus ride in a close 'spoon fashion' . . . broken ribs, injured arms and legs, and bloody heads often result; even fatalities are not unknown" (88 L. ed. (adv. ops.) 613, app. pet. 135). With regard to the rules of conduct during the trip, these in petitioner's mines are prescribed by mining law and not by petitioner (R. 381-2, Ex. I, R. 496) as above noted, while the converse was true in the Muscoda Case (40 F. Supp. 10, app. pet. 101). With regard to the requirement of riding rather than walking, the finding in the Muscoda Case was that the employers refused to permit the miners to walk rather than ride (88 L. ed. (adv. ops. 613), app. pet. 135), whereas in petitioner's mines that feature is optional (R. 218).

(ii) *"Physical and Mental Exertion."*—In the Muscoda Case the physical exertion was shown to result from the overcrowding of the skips and the condition of the mine haulways, while the mental exertion related to the hazards encountered. In petitioner's mines there was no overcrowding as just above noted, the feature of hazard was insignificant as will be noted just hereinafter, while the District Court found in general under this head that *"no work or labor is required of employees riding on mantrips"* (53 F. Supp. 939, app. pet. 49).

(iii) *"Activity Necessary to be Performed for the Employer's Benefit."*—In contrast to the finding in the Muscoda Case under this head, in petitioner's mines, the mantrips "constitute a benefit to both employer and employees" (53 F. Supp. 939, app. pet. 48).

(iv) *"Conditions Peculiar to the Occupation of Min-*

ing."—Under this head the District Court in the Muscoda Case listed the following (40 F. Supp. 10, app. pet. 101):

(I) "Conditions Replete with Hazards."

(II) "Conditions Requiring Physical Exertion and Mental Alertness."

(III) "Conditions Unpleasant and Burdensome to Those Encountering Them."

(I) "Conditions Replete with Hazards."—In the Muscoda Case this Court said:

> "The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves . . . hazards to life and limb" (——U. S.——, 88 L. ed. (adv. ops.) 615, 64 S. Ct.——, app. pet. 138).
>
> "They are forced to jump several feet into the skip from the loading platform . . . with resulting injuries to ankles, feet and hands"——U. S.——, 88 L. ed. (adv. ops.) 613, 64 S. Ct.——, app. pet. 135).

In contrast, the finding in the instant case is that riding the mantrips is "less hazardous than other phases of mining operations" and "the injuries . . . received by employees in plaintiff's mines on mantrips are surprisingly few in number and extent" (53 F. Supp. 939, app. pet. 49). Respondents in their brief in opposition to the petition for certiorari (p. 7) sought to lighten the effect of the District Court's finding of absence of hazard on the mantrips by mentioning several serious accidents with the implication that these had occurred on mantrips in petitioner's mines. However, the court's finding was made on a conflict of testimony as to the circumstances under which the serious injuries had occurred. Testimony for petitioner in conflict with that for respondents was that the serious injuries did not occur on mantrips (R. 525, 482). Hence the statement in respondents' brief

must yield to the District Court's finding on a conflict of evidence.

(II) Conditions Requiring Physical Exertion and Mental Alertness.—This item has been dealt with hereinabove.

(III) Conditions Unpleasant and Burdensome to Those Encountering Them.—Under this head, in the Muscoda Case, the finding was that the mantrips were operated in air that "was humid and malodorous, the ventilation relatively poor, and the heat increasing with descent into the mine (40 F. Supp. 9, app. pet. 101). In contrast, the positive evidence in the instant case showed that the temperature in petitioner's mines remains constant throughout the year at 58 to 65 degrees (R. 94); that there is no descent, the haulways being practically level (R. 84); that there are no odors on the travelways (R. 499); that there is a constant and adequate circulation of fresh air—more than the legal minimum—by electrically operated fans (R. 92-3); and that there is no heat or humidity (R. 94).

The finding of the District Court is that in petitioner's mines, "riding on mantrips while definitely not luxurious, is neither painful nor unduly uncomfortable (53 F. Supp. 939, app. pet 49) and that "I have found no such painful and burdensome conditions as those described in the iron ore mines" (53 F. Supp. 949, app. pet. 71), thus constituting a definite finding of *absence* of the conditions upon which the finding of the Court was based under this head in the Muscoda Case. O'Neill said: "You can't run pullman trains in a coal mine, but there is no more discomfort in a ride on a trip of mine cars at six miles per hour than there is in sitting in that chair" (R. 164).

(b) Custom.—

In the Muscoda Case the finding under this head was that

while the plaintiffs contended that "custom has always and universally" established the "face to face" basis, "the evidence has disclosed no such custom" (40 F. Supp. 7, app. pet. 95-6).

> ". . . No custom existed that would indicate that the phrases 'employ' and 'workweek', used in Section 7 of the Act, would be understood, in their application to underground iron ore mining, to exclude such time from their purport" (40 F. Supp. 7, app. pet. 97).

In contrast, the finding in the case at bar is that the " 'face to face' basis is traditional . . . and *has universally been the basis* for the determination of hours of labor . . . for approximately the past fifty years" (53 F. Supp. 939, app. pet. 50).

(c) Collective Bargaining Agreements.—

In the Muscoda Case the District Court found that "the methods of payment of wages were dictated almost entirely by the employers . . . It cannot be said that . . . the proposition that the time in question is not work time" was with the "free and uncoerced agreement" of the iron ore miners (40 F. Supp. 8, app. pet. 97), who "prior to the enactment of the . . . Act . . . repeatedly made efforts to obtain full, or at least a larger partial, compensation for so-called travel time" (40 F. Supp. 8, app. pet. 97). In contrast, the finding in the instant case regarding the "strong and powerful" union has been mentioned hereinbefore (*supra*, p. 12).

Moreover, in the bituminous coal mining industry, as pointed out before (*supra*, pp. 8-10):

> "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and *is the result of collective bargaining in its complete sense*" Houck Letter, 53 F. Supp. 951-2, (app. pet. 77).

(d) Other Relevant Facts and Circumstances.

In the view which the Circuit Court of Appeals took of this case, it felt constrained, as hereinbefore pointed out, to ignore the findings of the District Court on the surrounding facts and circumstances, such as custom and collective bargaining, considering that this Court had held that such facts were "immaterial in any event" (*supra*, p. 59). This Court held in the *Skidmore Case, supra,* (89 L. ed. (adv. ops.) 127), that just such facts, including the

> "agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances,"

are relevant and material in just such a case as this under the Act.

Such facts in the case at bar may be summarized as follows:

(i) Fifty years of custom and contract, which had no parallel in the Muscoda Case (*supra*, p. 9).

(ii) The NRA Bituminous Coal Code, with its adoption of the contract definition, which had no parallel in the Muscoda Case (*supra*, p. 13).

(iii) The Bituminous Coal Act of 1937 and the hearings and proceedings before the Bituminous Coal Commission during the years 1938-40, which had no parallel in the Muscoda Case (*supra*, pp. 30-31).

(iv) The legislative history, with its specific discussion of the bituminous coal industry and its clear indication that Congress did not intend to disturb the industry's existing

standards of wages and hours, which had no parallel in the Muscoda Case (*supra*, pp. 29-35, *infra*, pp. 77-79).

(v) The Houck Letter and the circumstances which evoked it, which had no parallel in the Muscoda Case (*supra*, pp. 15-20).

(vi) The Administrator's ruling and the weight to which it is entitled, which had no parallel in the Muscoda Case (*supra*, p. 20, *infra*, p. 71).

(vii) The collective bargaining agreements subsequent to the effective date of the Act, namely, the 1939 Agreement, the 1941 Agreement and the 1943 Six-day Week Agreement, with their clear implications that no one connected with the industry believed that the Act invalidated the contract definition of the working day, which had no parallel in the Muscoda Case (*supra*, pp. 14, 22, 38-48).

(viii) The Union's prolonged efforts, "vigorous and forceful to the last degree" (R. 296), to obtain a wage increase in 1943 without abandoning the contract definition, with their necessary implication that the Union still believed the definition legal up to the date when the National War Labor Board disallowed the First Illinois Supplemental Agreement, which had no parallel in the Muscoda Case (*supra*, p. 45).

(ix) The practical difficulties in operation which would result from a mandatory "portal to portal" definition of the working day and which could not be overcome under normal conditions of competition, which had no parallel in the Muscoda Case (*supra*, pp. 50-54, *infra*, p. 72).

(x) The equities in favor of petitioner, which had no parallel in the Muscoda Case (app. pet. 26-40, *infra*, p. 75).

This surely throws an impressive, nay an overwhelming,

weight on petitioner's side of the scale. The word "work" in the Act has no technical meaning, nor has it in the bituminous coal mining industry. That is "work" in both, which is "work" in the common use and acceptation of the persons who have daily occasion to mention it. These necessarily are the persons in the industry. These have spoken with unanimous voice in this record, over a period of fifty years, and under circumstances which must again and again have made dissent vocal, if dissent had existed.

Should John L. Lewis know what is work in this industry? If so, read his brief and his testimony on the NRA Code, his testimony on this Act; look at his sentiments expressed in the Houck Letter; look at his signature set to the long succession of basic wage agreements. He certainly never believed that this underground travel was work.

Should Charles O'Neill know? His testimony is plain.

The Circuit Court of Appeals found no testimony in the record to create a conflict. They reversed solely on the ground of the Muscoda Case, and *not on the Muscoda record, for that was not before them, but on general language in this Court's opinion, applicable not to the record before them, but to a very different state of facts.* This was surely error.

Specification 3.—The Circuit Court of Appeals Erred in Deciding that it was Foreclosed by the Muscoda Case from Considering the Fact that the Ultimate Change of Front by the Union was Made in Such Circumstances as to Entitle its New Position to no Evidentiary Weight.

As has been shown hereinbefore (*supra*, p. 41), the Union reversed its official position in favor of preserving the contract definition only in order to open a passage to a wage increase after all other approaches had failed. This

eleventh hour conversion ought not to be accorded any weight as evidence upon the issue in this case. The point is crisply phrased by Judge Soper in his dissenting opinion:

> ". . . *This change in front on the part of the miners for bargaining purposes, when making an agreement for future operations, could not affect the condition which formerly existed in the industry or transform into work time that which was not work time in the generally accepted meaning of the term that had prevailed in the industry for a long time when the statute was passed and that continued to prevail with administrative sanction for five years after its enactment. The statute could not have one meaning in the earlier and another meaning in the later period*" (145 F. 2d. 15, app. pet. 90).

Specification 4. — The Circuit Court of Appeals Erred in Failing to Give the Bituminous Coal Ruling of the Administrator the Proper Weight or Any Weight.

The thorough and prolonged consideration which the Administrator gave to the issue here has been shown hereinbefore (*supra*, pp. 15-21), a consideration which overlapped his consideration of the corresponding issue in the iron ore mining industry. He found such different facts that he made converse rulings relative to the two respective industries. As pointed out in our brief on the petition (pet. pp. 22-24), the District Court in the Muscoda Case leaned heavily upon the Administrator's ruling in that industry, while the District Court in the instant case correspondingly leaned heavily upon the Administrator's ruling in this case.

The Circuit Court of Appeals erred in ignoring the Administrator's ruling in the bituminous coal mining industry. This Court recently had occasion to consider the effect of the Administrator's rulings and the weight to be accorded them

by the courts. In *Skidmore v. Swift & Co., supra,* (89 L. ed. (adv. ops.) 125, 127-9), it was said by this Court in an opinion by Mr. Justice Jackson, with reference to the Administrator's ruling on a question analogous to the present one, as follows:

> ". . . Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity, and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. *They provide a practical guide to employers and employees* as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13."
>
> ". . . the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case . . . Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.
>
> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not

controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . ."

The above quoted expression of this Court clearly approves the action of the District Court in leaning strongly upon the Administrator's bituminous coal ruling. The District Court said:

> "It seems to me that this particular administrative ruling is entitled to even more than the "great weight" to which the Supreme Court said such rulings were entitled generally, by reason of the thoroughness with which the Administrator went into the question before making his ruling" (53 F. Supp. 945, app. pet. 62).
>
> "I do not find anything in this record which satisfies me that this ruling was plainly wrong; in fact, I find nothing which casts doubt upon its correctness. Giving to it the 'great weight' to which the Supreme Court has said it is entitled, it is my conclusion to follow and sustain this ruling" (53 F. Supp. 946, app. pet. 64).

In this it seems clear that there was no error.

Specification 5. — The Circuit Court of Appeals Erred in Ignoring the Practical Difficulties in Operation which would Result from Construing the Act so as to Make Mandatory the Portal to Portal Definition of the Working Day.

A decent regard for the elementary discretion of a law making body should restrain the courts from so interpreting a statute as to produce an impracticable or ruinous result unless no other reasonable interpretation can be made. This record shows the disastrous results to be apprehended under normal conditions of competition if "portal to portal" is found to be mandatory under the Act (supra, pp. 49-54). It is to be noted that not only are these views uncontradicted

in the record but that they were shared by the leaders both of the Union and of the operators. The statement in the Houck Letter that the result of construing the Act to make "portal to portal" mandatory "would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States" and that it would confront the wage conference "with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation" (53 F. Supp. 953, app. pet. 78), was jointly composed and subscribed by the leaders of both elements. The testimony of O'Neill, Morrow, Burke and St. Clair at the trial to the same effect (R. 143, 192-3, 297, 80), was not sought to be contradicted by the Union.

The only reply which the Union can make now, and does make, is that "it is a matter of common knowledge that the majority of the coal operators throughout America have gone upon a portal to portal basis" (br. for resp. in opp. to pet. p. 10). But that reply misses the point. The operators have not gone upon a *statutory* "portal to portal" basis, but have accepted an agreement including a modified "portal to portal" plan in which the amount of travel time is assumed and applied alike in all cases. And besides the Act is to be construed in the light of normal conditions in the industry, conditions which prevailed when the Act was passed, conditions which may reasonably be expected to return at the end of the war. Under those conditions the industry was, and will inevitably again become, "a highly competitive industry" (53 F. Supp. 942, app. pet. 56). It was to those conditions that the Houck Letter and the testimony in the record referred.

But present conditions in the industry, the conditions un-

der which the Ickes-Lewis Agreement was negotiated and which still prevail, are not competitive. It is a matter of common knowledge that the industry is unable to supply the wartime demand for coal, and that all the coal that can be produced is sold without the shadow of effort at the price ceilings fixed by the Government; ceilings which are fixed so as to enable all operators to produce at a profit notwithstanding the great increase in operating costs resulting from "portal to portal" and other wage increases which have been made during the course of the war period.

The views expressed in the Houck Letter were perfectly sound, as a consideration of the state of the industry under normal conditions must show, and the vindication of those views will come, as O'Neill said, "as competitive conditions return" (R. 145), when price ceilings will be meaningless.

It is also argued by the Union that the Ickes-Lewis Agreement and the succeeding agreements by which the operators adopted the Ickes-Lewis Agreement, "recognize that coal miners *are entitled* to pay from portal to portal" (br. for resp. in opp. to pet. p. 8). That is an unsound argument. The agreements carry no such implication. They do not mean that Mr. Ickes ruled, or that the National War Labor Board held, or that the operators have conceded, that the *Act required* the change to "portal to portal". The fact was that the Union, under present wartime conditions obtained these agreements, and the wage increases thereby provided, *through collective bargaining*, first with Mr. Ickes, and then with the operators. The situation was such that the operators concluded that it was to their interest to *agree* to the "portal to portal" feature of those agreements (supra, p. 49). They did this in the field of *contract* not of *statutory compulsion*.

So long as the Act is not construed by the courts to make

the "portal to portal" basis mandatory, the parties have the right to operate upon the "portal to portal" basis or upon the "face to face" basis as they may from time to time agree. But if the courts make permanent a construction of the Act which the Union advanced for temporary purposes only (purposes which were obtained without the statutory compulsion), then the door will be locked, the field of *"status"* will be substituted for that of *"contract"* (in Sir Henry Maine's phrase), and the parties will not be able, upon the restoration of normal conditions, to make such modification of the "portal to portal" definition as the changing circumstances may make advisable from the standpoint of both sets of interests. If the question was left by Congress in the field of contract as petitioner contends, it may be solved by the parties from time to time by collective bargaining in the future as in the past.

The instant case does not present merely a mutually exclusive issue of "face to face" or "portal to portal". The Act sets *minima* as to wage standards, not *maxima*. Hence nothing forbids employers to pay wages for activities or inactivities of their employees which are not *required* by the Act to be considered as work time and compensated for as such.

Specification 6. — The Circuit Court of Appeals Erred in Ignoring the Equities of the Case in Favor of Petitioner.

These equities were pointed out in our brief in support of the petition, pp. 26-40. The Act should not be construed so as to bring about an unconscionable result unless it cannot be reasonably interpreted so as to avoid such a result.

The operators, since the effective date of the Act, relied upon the concurring views of all parties concerned — the

Union, the Administrator, the operators themselves — that the Act did not invalidate the contract definition, and that no potential liability was accumulating for overtime on account of underground travel. With regard to their right to rely upon the ruling of the Administrator, this Court recently said, in *Skidmore v. Swift & Co., supra,* (December 4, 1944), (89 L. ed. adv. ops. 125, 127-8):

> (The Administrator) . . . "has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. *They provide a practical guide to employers and employees* as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13."

In the above quoted passage the Administrator's Interpretative Bulletin No. 13 was inferentially approved. It was that bulletin, as pointed out hereinbefore (supra, p. 20), which was quoted in the Houck Letter, and which the Administrator applied in his bituminous coal ruling.

In consideration of the equities, special attention should be given to the effect of the Six Day Week Agreement of February 10, 1943 (pet. p. 33). That agreement, if the construction of the Act now contended for by the Union is sustained, immensely accelerated the accumulation of potential overtime claims by adding several hours of overtime *per employee, per week, at the hourly overtime wage of $1.50.* When it is recalled that the Union has approximately 450,000 members, the wholly disastrous effect of that one recent agreement under the majority opinion of the Circuit Court of Appeals is readily envisioned.

Another highly important equity arises out of *the impracticability of changing the contract definition to "portal to*

portal" at the time when the Act became effective (pet. p. 32). This is clear from the following:

First, as stated in the Houck Letter, "the great amount of money involved" (53 F. Supp. 953, app. pet. 78) would have been such that "a negotiated adjustment would seem to be impossible." This is wholly uncontradicted;

Second, no justiciable controversy existed because there was no difference of opinion in the industry upon the point, and interpretation by the Courts could not have been had;

Third, the Union could not then have advanced its present contention because it could not have contemplated the friction which favorable action would have created among its own members, owing to the great resulting inequality of earnings and of effort on the basis of the seven hour day. O'Neill made the point clearly in referring to the motorman who is paid for operating the mantrip which carries employees who are paid the same merely for riding it (R. 143).

In general as to the equities, it is fair to say that the injustice of the judgment is so manifest and so profound as to shock the conscience. It permits the employees to depart from their own solemnly executed and many times affirmed contract, to recant their many protestations of its validity and propriety, and to collect very great, and perhaps overwhelming, damages from petitioner solely for its faithful performance of that contract.

Specification 7. — The Circuit Court of Appeals Erred in Failing to Give the Legislative History of the Act any Weight in Construing it.

As has been shown hereinbefore (*supra*, p. 29) the Congressional debates and committee proceedings brought out clearly that it was not the intention of Congress "to interfere in any way with the wage structure of the bituminous

coal industry" (53 F. Supp. 944, app. pet. 60). The committee reports, the testimony and the debates show this both positively, by the explicit references to that industry and by the large and fresh Congressional knowledge of conditions therein, and negatively by explanations of the character of conditions which the Act was designed to relieve.

This Court has held that it is proper to refer to the Congressional proceedings for light upon the legislative intent in cases like the present.

In U. S. v. Local 807 of International Brotherhood of Teamsters, etc. of America. et al (March 2, 1942), 315 U. S. 521, 528-530, 86 L. ed. 1004, 1009-1010 which involved the construction of the Anti-Racketeering Act. It was said in an opinion by Mr. Justice Byrnes:

> ". . . Confronted with these various interpretations we turn for guidance to the legislative history of the statute. Pursuant to a Senate Resolution of May 8, 1933, a sub-committee of the Senate Committee on Interstate Commerce, which became known as the Copeland Committee, undertook an investigation of 'rackets' and 'racketeering' in the United States.
>
> ". . . Thereafter, while the bill awaited the signature of the President, Senator Copeland submitted a report in which he referred to S. 2248 as one of the eleven bills which had been enacted 'to close gaps in existing Federal laws and to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types.'
>
> "This account of the legislative proceedings obviously does not provide specific definition of 'wages', 'bona fide employer', or 'bona fide employee', as those terms are used in 2 (a). But it does contain clear declarations by the head of the Department which drafted the section and by the sponsor of the bill in Congress, first, that the elimination of terroristic activities by profes-

sional gangsters was the aim of the statute, and second, that no interference with traditional labor union activities was intended".

The Act here, like the Anti-racketeering Act, provides no specific definition of the questioned terms but, to paraphrase the language of the Teamsters decision, "it does contain clear declarations by the President of the United States and by the sponsors of the bill in Congress and by numerous others, without expression of dissent, first that the elimination of sweatshops and child labor was the aim of the statute, and second that no interference with bona fide collective bargaining was intended."

In *Western Union Telegraph Company v. Lenroot* (January 8, 1945) ——U. S.——, a case involving the child labor provision of the Act, this Court in an opinion by Mr. Justice Jackson considered in detail the legislative history of the Act for light upon the question whether Western Union messengers were within the coverage of the Act and ascertained from that history that Congress in considering the bill had rejected provisions which if enacted would have sustained the contention of the children's bureau in the case.

We point out that neither in the Teamsters case nor in the Western Union case did this Court follow any clearer implication from the legislative history than is afforded here.

Specification 8. — The Circuit Court of Appeals Erred in Deciding that the Humanitarian Purpose of the Act is Decisively in Favor of the Interpretation now Contended for by Respondents.

The Circuit Court of Appeals quoted the general language from this Court's opinion in the Muscoda Case ex-

pressing the humanitarian purpose of the Act and stating that "it must not be interpreted or applied in a narrow, grudging manner" and that the Act "was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it" (145 F. Supp. 11, 12, app. pet. 82, 85).

The Circuit Court of Appeals was of opinion that this general language is decisive of the instant case as well, but the Circuit Court of Appeals failed to note that the instant case does not present those facts which in the Muscoda Case led this Court to conclude that the humanitarian purpose of the Act demanded a decision there in favor of the employees. The important point is that in the present record the evidence is uncontradicted and comes from the leaders of both parties, that under normal competitive conditions the "portal to portal" basis would "create so much confusion in the bituminous industry as to result in complete chaos. . ." (53 F. Supp. 940, app. pet. 52). This record provides no basis upon which a finding can be made that to construe the Act to require mandatory "portal to portal" would subserve the best interests of either employees or employers in this industry. So to hold would "codify and perpetuate" the "portal to portal" basis at all events and under all circumstances. The testimony is uncontradicted and it is surely clear as a matter of common sense, that an enlightened self-interest in the industry demands that the parties be left free to solve the issue here from time to time through collective bargaining in the light of the changing conditions that must develop.

CONCLUSION

Petitioner believes that it is clear upon the law and the

facts that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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